

***United States Court of Appeals
for the Second Circuit***

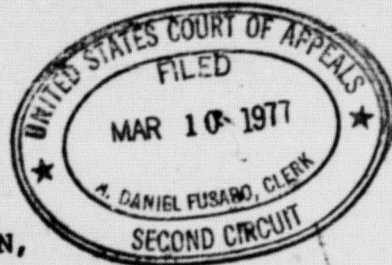


APPENDIX

77-6002

UNITED STATES COURTS OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6002



COMMODITY FUTURES TRADING COMMISSION,

Plaintiff-Appellant,

v.

BRITISH AMERICAN COMMODITY OPTIONS CORP.,

Defendant-Appellee.

BPLS

On Appeal from the United States District Court
for the Southern District of New York

JOINT APPENDIX

Frederic T. Spindel
Associate General Counsel

Commodity Futures Trading
Commission
2033 "K" Street, N. W.
Washington, D. C. 20581

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RELEVANT DOCKET ENTRIES

- 7/23/76 1. Filed complaint and issued summons.
- 7/23/76 2. Filed Plaintiffs Affidavit and order for appointment of Alvaro Galli, Laurence Nebesny and Philip Rix as process servers. Raymond P. Burghardt, Clerk.
- 7/23/76 3. Filed Plaintiffs Affidavit and Proposed Order to Show Cause on the 17th day of July, 1976, at 11:30 a.m. in Room 2001 why a preliminary injunction should not be issued for preliminary injunction. Conner, Jr.
- 7/23/76 4. Filed Plaintiff's Memorandum in support of motion for preliminary injunction. Conner, J.
- 7/27/76 PRE-TRIAL CONFERENCE HELD BY GAGLIARDI, J.
- 8/3/76 5. Filed memorandum in support of defendant's motion to dismiss and in opposition to plaintiff's motion for a preliminary injunction.
- 8/10/76 5a. Filed Affidavit of Charles J. Hecht for defendant in opposition to plaintiff's request for preliminary injunction.
- 8/10/76 6. Filed Affidavit of John Forma for defendant in opposition to plaintiff's request for preliminary injunction.
- 8/10/76 7. Filed Affidavit of George Plave for defendant in opposition to plaintiff's request for preliminary injunction.
- 8/13/76 8. Filed Supplemental Memorandum in support of plaintiff's motion for injunction and in opposition to defendant's motion to dismiss.
- 8/26/76 9. Filed Defendant's Reply Memorandum in support of motion to dismiss and in opposition to plaintiff's motion for preliminary injunction in response to plaintiff's supplemental memorandum.
- 9/23/76 PRE-TRIAL CONFERENCE HELD BY GAGLIARDI, J.
- 10/6/76 PRE-TRIAL CONFERENCE HELD BY GAGLIARDI, J.
- 10/21/76 10. Filed Opinion #45273...After consideration of the record, testimony at the hearing and other circumstances, the court concluded that in the exercise of its discretion that a preliminary injunction against British American is unwarranted. As a result, the court grants defendant's

request for a directed verdict. This decision is in no way an indication on the merits of the issues to be decided before the administrative law judge. The foregoing constitutes the court's finding of fact and conclusions of law as required by Rule 52(a) F.R. Civ. P. Gagliardi, J m/n

- 11/16/76 11. Filed transcript of record of proceedings date 10-06-76
- 12/3/76 12. Filed transcript of record of proceedings dated 09-23-76
- 12/17/76 13. Filed Plaintiff's Notice of Appeal from an Opinion and Order entered 10-20-76 which granted defendant's motion for a directed verdict and denied plaintiff's motion for preliminary injunction. (mailed copy to Charles J. Hecht on 12-20-76).
- 1/17/77 14. Filed notice that record on appeal certified and transmitted to U.S.C.A.

William R. Schief, Esq.
Charles Harris, Esq.
Jay B. Grossman, Esq.

Attorneys for the
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Leslie Blau, Esq.
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New York, New York 10006

Telephone: (212) 264-1700

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Commodity Futures Trading Commission,
Plaintiff,

-vs.-

British American Commodity Options
Corp.,

Defendant.

Docket No.

76 CIV 3247 CBM

C O M P L A I N T
FOR PRELIMINARY INJUNCTION
AND PERMANENT INJUNCTION

1. Plaintiff Commodity Futures Trading Commission ("CFTC")
avers that Defendant British American Commodity Options Corp.
("British American") has engaged, is engaging or is about to engage
in acts and practices which constitute violations of the commodity
trading advisor registration requirements at § 4m of the Commodity
Exchange Act, as amended ("the Act") [7 U.S.C. § 6m]. Accordingly,
Plaintiff, pursuant to § 6c of the Act [7 U.S.C. § 13a-1], brings
this action to enjoin such acts and practices.

2. This Court has jurisdiction under § 6c of the Act [7
U.S.C. § 13a-1]. Defendant transacts business within this district
and the acts and practices in violation of the Act have occurred,
are occurring and are about to occur within this district.

3. Plaintiff CFTC is a duly constituted independent regulatory agency of the United States of America which, since April 21, 1975, has been charged with the responsibility for administering and enforcing the various provisions of the Act [7 U.S.C. §1 et seq.].

4. Defendant British American purports to be a corporate business entity which was duly organized in October 1975 under the laws of the State of New York, where it maintains offices at 80 Wall Street, in the Borough of Manhattan, New York, from which place it transacts business. Defendant also maintains a branch office at 9200 South Dadeland Boulevard, Miami, Florida.

5. Defendant British American is engaged, among other things, in the business of promoting, recommending and selling to its customers certain legal rights or choses in action commonly known as "London commodity options". Such London commodity options confer upon the holder the right either to buy or to sell a commodity futures contract on the appropriate commodity market of London, England at a sum certain price within a specified time period.

6. From January 1, 1976 through June 25, 1976, British American, while purporting to act as agent for its customers, purchased numerous London commodity options which it later resold as principal to its customers at prices averaging at least 50% more than the sum which British American had paid for such options.

7. In selling London commodity options to its customers, since October 1975 British American has engaged and continues to engage, for compensation or profit, in the business of advising its customers either directly by means of the telephone or through publications or writings as to the value of commodities and as part of such business British American has issued or caused to be issued analyses and reports concerning commodities, all of which have involved and continue to involve the use of the mails and other means and instrumentalities of interstate commerce, thus coming within the statutory definition of a commodity trading advisor as set forth at § 2(a)(1) of the Act [7 U.S.C. § 2].

8. Since October 1975, British American has made and continues to make use of the mails or other instrumentalities of interstate commerce in the conduct of its business as a commodity trading advisor without having registered as such under the Act, thus violating the provisions of § 4m of the Act [7 U.S.C. § 6m] which, in the absence of such registration, make unlawful the use of the mails or instrumentalities of interstate commerce in such endeavor.

9. In March 1976, British American applied to the CFTC for registration as a commodity trading advisor. On or about April 16, 1976, the CFTC refused to grant registration to British American and ordered a public administrative proceeding to determine whether British American was fit to be a commodity trading advisor. As of the time of the filing of this action no date had been set for such administrative proceeding.

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4.

9. Unless restrained and enjoined British American will continue to violate §4m of the Act [7 U.S.C. §6m].

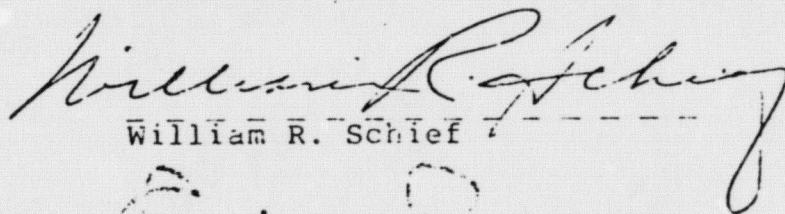
ACCORDINGLY, plaintiff Commodity Futures Trading Commission requests that this Court:

A. enter a preliminary injunction, thereafter to be made permanent, restraining and enjoining defendant British American Commodity Options Corp., its officers, directors, shareholders, employees, servants, agents, attorneys, affiliates, successors and assigns, and any other person, firm or entity in active concert or participation with any of them who or which may receive actual notice of such order by personal service or otherwise and each of them from directly or indirectly using the mails or any other means or instrumentality of interstate commerce for the purposes of engaging in the business of advising others, through publications, writings or otherwise, respecting the value of commodities for future delivery on or subject to the rules of contract markets or otherwise, or from disseminating oral or written analyses or reports concerning commodities irrespective of whether traded on contract markets, unless it is registered with the Commodity Futures Trading Commission as a commodity trading advisor in accordance with the requirements of § 4m of the Commodity Exchange Act, as amended; and,

5.

B. grant such other further relief as this Court may deem necessary and proper under the circumstances.

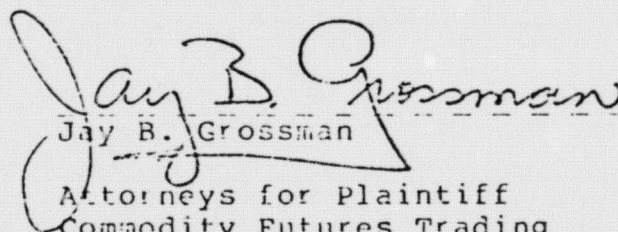
Respectfully submitted,



William R. Schief



Charles Harris



Jay B. Grossman

Attorneys for Plaintiff
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Commission
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Of Counsel:



Leslie Blau
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Telephone: (212) 264-1700

Dated: July 22, 1976

William R. Schief, Esq.
Charles Harris, Esq.
Jay B. Grossman, Esq.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Commodity Futures Trading Commission,

Plaintiff,

-vs.-

British American Commodity Options
Corp.,

Defendant.

Docket No.

76 CIV 3247 CBM

N O T I C E

TO: Charles J. Hecht, Esq.
Suite 1760
60 East 42nd Street
New York, New York 10017

Attorney for
British American Commodity Options Corp.

TAKE NOTICE that on the 27 day of July 1976, at 11:30
o'clock, a.m., Eastern Daylight Time, or as soon thereafter as
counsel may be heard, in the Courtroom of the Hon. Constance B. Motley,
a Judge of the United States District Court for the Southern
District of New York, being Room No. 2001 in such Court House,

Plaintiff will present the within Rule to Show Cause respecting the granting of the INJUNCTION there specified, at which time and place you are invited to be present.

s/ Charles Harris

Charles Harris
2033 K Street, N. W.
Washington, D. C. 20581

Attorney for Plaintiff
Commodity Futures Trading
Commission

Telephone: (202) 254-7424

Local Address:

Leslie Blau, Esq.
Commodity Futures Trading
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61 Broadway, Room 2101
New York, New York 10006

Dated: July 22, 1976.

Telephone: (212) 264-2840

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

3

Commodity Futures Trading Commission,

Plaintiff,

-vs.-

British American Commodity Options
Corp.,

Defendant.

Docket No.

76 CIV 32-7 CBM

PROPOSED ORDER
TO SHOW CAUSE

FOR PRELIMINARY INJUNCTION

Upon consideration of the averments made in the complaint filed in this matter and in the attached affidavits of Raymond E. Brennan, Martin Brown, Mary Ann Chiacchere, Charles Harris, Bernard Prince and Laurence Youell, each of which has been sworn to and subscribed as indicated thereon:

A RULE is now entered upon Defendant British American Commodity Options Corp. TO SHOW CAUSE in the Court House of the United States District Court for the Southern District of New York on the 27 day of July 1976, at 11³⁰ o'clock, a.m., Eastern Daylight Time, or as soon thereafter as counsel may be heard in Room 2001 of such Court House before the Hon.

Constable Ben Motley, a Judge of said Court, why a preliminary injunction is pursuant to Rule 65 FRCP should not be issued restraining and enjoining Defendant British American Commodity Options Corp., its officers, directors, shareholders, employees, servants, agents, attorneys, affiliates, successors and assigns, and any other person, firm or entity in active concert or participation with any of them who or which may receive actual notice of this

...and each of them from
directly or indirectly using the mails or any other means or
instrumentality of interstate commerce for the purposes of
engaging, for compensation or profit, in the business of advising
others, through publications, writings or otherwise, respecting
the value of commodities for future delivery on or subject to
the rules of contract markets or otherwise, or from disseminating
oral or written analyses or reports concerning commodities
irrespective of whether traded on contract markets, unless
it is registered with the Commodity Futures Trading Commission
as a commodity trading advisor in accordance with the requirements
of § 4m of the Commodity Exchange Act, as amended; and it is
also:

10

ORDERED that a copy of this Order and ancillary documents
upon which this Order is based be served upon Defendant British
American Commodity Options Corp. by delivering a copy of same
in person or by certified mail to Charles J. Hecht, Esq., counsel
for British American Commodity Options Corp., at his offices:

WCC Suite 1760, 60 East 42nd Street, in the Borough of Manhattan,
New York, New York 10017 ^{on or before 12:00 N. on July 23, 1976} which service shall be deemed to be
fully adequate and proper.

DATED: New York, New York, July 22, 1976.

~~By the Court~~
s/William C. Conner
J. S. O. J.

Wg.

AFFIDAVIT OF CHARLES HARRIS

11

State of New York)
) ss.:
County of New York)

Before me, the undersigned authority, a notary public in and for said County and State, personally appeared Charles Harris, who, being duly sworn according to law, deposes and says that:

1. I am admitted to practice before the Supreme and Superior Courts of the Commonwealth of Pennsylvania and the United States District Court for the Western District of Pennsylvania and am Special Counsel to the Commodity Futures Trading Commission, an independent regulatory agency of the United States of America which maintains offices at 61 Broadway, in the Borough of Manhattan in New York.

2. In such capacity I am familiar with the facts and circumstances surrounding the application of British American Commodity Options Corp. to be a commodity trading advisor. Attached to and made part of such application were:

A. a copy of a consent judgment of permanent injunction executed by John Forma, the sole shareholder of British American Commodity Options Corp., both individually and in his capacity as a corporate officer in the case of Securities and Exchange Commission -vs.- John Forma Securities, Inc. and John Forma, filed at 70 Civil Action No. 1743 in the United States District Court for the Southern District of New York;

B. a copy of a consent judgment of permanent injunction executed by John Forma, the sole shareholder of British American Commodity Options Corp., both individually and in his capacity as a corporate officer in the case of Securities and Exchange Commission -vs.- Forma Securities Incorporated and John James Forma, filed at 73 Civil Action No. 643 in the United States District Court for the Southern District of New York; and

C. copy of findings and orders imposing remedial sanctions in the matter of Forma Securities, Inc. John Forma and Vincent Forma, filed at Admin. Proc. File No. 3-4540 before the Securities and Exchange Commission on or about April 28, 1975.

By reason of the above matters, pursuant to §§ 4(n)7 and 8a(2) of the Commodity Exchange Act, as amended [7 U.S.C. §§ 6(n)7 and 12a(2)], the Commodity Futures Trading Commission on April 16, 1976 refused to grant British American Commodity Options Corp. registration and ordered a public administrative hearing to determine whether British American Commodity Options Corp. is fit to be registered as a commodity trading advisor. Attached to this affidavit as Exhibit "C" is a true and correct copy of the complaint and notice of hearing filed in the pending public administrative proceeding. Attached to this affidavit as Exhibit "B" is the certificate of Jane Stuckey, Director of the Secretariat of the Commodity Futures Trading Commission which attests to the fact that as of July 12, 1976, British American Commodity Options Corp. was not registered in any capacity with the Commodity Futures Trading Commission. I aver that between July 12, 1976 through July 21, 1976 British American Commodity Options Corp. remained unregistered with this Commission.

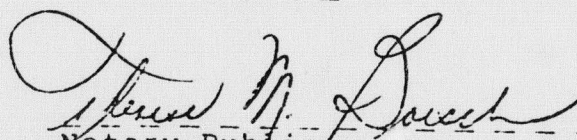
Because of defendant's flagrant and continuous violation of the
Commodity Exchange Act, this matter is of the urgency which would
justify proceeding by way of an order to show cause. No prior
application has been made.

3.

3. On or about April 30, 1976, I sent to Charles J. Hecht, Esq., counsel for British American Commodity Options Corp., a telegram, the copy for which is attached as Exhibit "A", in which the Division of Enforcement of the Commodity Futures Trading Commission advised Mr. Hecht that so long as his client was unregistered as a commodity trading advisor it could not act in such capacity and that his client should cease to act as a commodity trading advisor by 5 p.m. Wednesday, May 5, 1976, at which time Mr. Hecht was to notify the Commission of such fact. A copy of such telegram was also mailed to Mr. Hecht and British American Commodity Options Corp. on April 30, 1976. The time having passed without receipt of such notification, I instructed Messrs. Brennan and Prince and Ms. Chiacchere to telephone British American Commodity Options Corp. on and after May 6, 1976 to ascertain whether British American was giving advice and analyses respecting commodities. Their affidavits indicate the results of such telephone calls.


Charles Harris

SWORN TO AND SUBSCRIBED BEFORE ME THIS 22 DAY OF JULY 1976


Notary Public

My commission expires:

THURSDAY, MARCH 22, 1978
Notary Public, State of New York
No. 41-5036900
Commission Expires March 22, 1978

REFERENCE: 76-0003

14

TEXT OF TELEGRAM PHONED IN TO
WESTERN UNION AT 11:05 A.M.,
E.D.T., APRIL 30, 1976

CHARLES J. BECHT, ESQ.
60 EAST 42ND STREET
NEW YORK, NEW YORK 10017

TELEPHONE: 212 490 3232

REGARDING: BRITISH AMERICAN COMMODITY OPTIONS CORP.

IN OUR TELEPHONE CONVERSATION OF APRIL 29, 1976, YOU STATED THAT YOUR CLIENT, BRITISH AMERICAN COMMODITY OPTIONS CORP., CONTINUED TO BUY AND TO SELL TO ITS CUSTOMERS LONDON COMMODITY OPTIONS, WHICH STATEMENT HAS BEEN CORROBORATED BY OTHER INFORMATION IN OUR POSSESSION. YOU WERE ADVISED OF OUR VIEW THAT YOUR CLIENT IS, THEREFORE, IN VIOLATION OF SECTION 4 N OF THE COMMODITY EXCHANGE ACT, AS AMENDED, TO THE EXTENT THAT THIS ACTIVITY CONSTITUTES IT AS A COMMODITY TRADING ADVISOR WITHOUT BEING REGISTERED UNDER SUCH ACT. YOUR CLIENT'S CONTINUED VIOLATION OF THE ACT IS NOT SANCTIONED BY THE PENDENCY OF THE ADMINISTRATIVE PROCEEDING TO DETERMINE WHETHER YOUR CLIENT IS FIT TO BE A COMMODITY TRADING ADVISOR. THE FACT REMAINS THAT UNTIL YOUR CLIENT HAS BEEN REGISTERED UNDER THE ACT IT CONTINUES TO BE UNREGISTERED AND THUS IS PROHIBITED FROM ACTING AS A COMMODITY TRADING ADVISOR. MERELY APPLICATION FOR REGISTRATION DOES NOT CONSTITUTE REGISTRATION. ACCORDINGLY, WE MUST INSIST THAT YOUR CLIENT PROMPTLY CEASE TO TRANSACT BUSINESS AS A COMMODITY TRADING ADVISOR AND THAT IT REFRAIN FROM TRANSACTING SUCH BUSINESS UNTIL SUCH TIME AS IT SHALL HAVE BECOME REGISTERED UNDER THE COMMODITY EXCHANGE ACT, AS AMENDED. IF YOU SHALL NOT HAVE NOTIFIED US BY 5 P.M., E.D.T., ON

BEST COPY AVAILABLE

WEDNESDAY, MAY 5, 1976 THAT YOUR CLIENT HAS COMPLIED WITH
THIS REQUEST, WE SHALL HAVE NO ALTERNATIVE BUT TO PURSUE
APPROPRIATE REMEDIES.

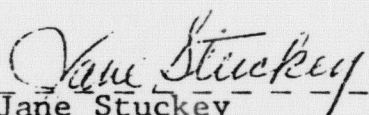
WILLIAM R. SCHIEF, DIRECTOR
DIVISION OF ENFORCEMENT
COMMODITY FUTURES TRADING COMMISS
BY: CHARLES HARRIS, SPECIAL COME

EXHIBIT "A"

C E R T I F I C A T E

I, Jane Stuckey, certify that I am Director of the Secretariat of the Commodity Futures Trading Commission, an independent regulatory agency of the United States of America; that in such capacity I am familiar with the official public records of this Commission; that I have caused an inspection of such official public records to be made; and that such inspection has revealed that as of July 12, 1976, British American Commodity Options Corp. was not registered with this Commission in any capacity whatsoever.

WITNESS my hand and the official seal of the Commodity Futures Trading Commission this 12th day of July 1976.


Jane Stuckey -----
Director of the Secretariat
Commodity Futures Trading
Commission

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

17

RECEIVED
CFTC
STAMP

In the Matter of :

BRITISH AMERICAN COMMODITY
OPTIONS CORP.
80 Wall Street
New York, New York 10005

APPLICANT

CFTC Docket No. 15

COMPLAINT AND NOTICE
OF HEARING PURSUANT
TO SECTIONS 4(n)7 AND
8a(2) OF THE COMMODITY
EXCHANGE ACT, AS
AMENDED

I

The official files of the Commission disclose that British American Commodity Options Corp. ("the Applicant") has submitted an application for registration as a commodity trading advisor pursuant to Section 4n of the Commodity Exchange Act, as amended ("the Act") and that John Forma is an officer, director and the sole shareholder of the Applicant.

II

Members of the Commission's staff have reported information which alleges that Applicant is unfit to be registered as a commodity trading advisor in that:

A. On or about April 30, 1970, John Forma, was permanently enjoined by an order of the United States District Court for the Southern District of New York from violating certain provisions of the Securities Exchange Act of 1934, as amended [15 U.S.C. §§ 78a-78jj] ("the 1934 Act") and applicable rules and regulations promulgated by the Securities and Exchange Commission ("the SEC") in connection with the activities of John Forma Securities, Inc. Specifically, John Forma was charged with and enjoined from violating those provisions of the 1934 Act and applicable SEC rules and regulations relating to:

1. the maintenance of accurate and complete books and records; and,
2. the maintenance of adequate net capital.

B. On or about May 8, 1973, John Forma was permanently enjoined by an order of the United States District Court for the Southern District of New York from violating the same provisions of the 1934 Act and SEC rules and regulations in connection with the activities of Forma Securities Incorporated.

C. On or about April 28, 1975, John Forma was barred by the SEC from association with any broker, dealer, registered investment company or registered

-3-

investment advisor. This action was predicated upon findings by the SEC that John Forma had willfully violated or aided and abetted violations of the identical provisions of the 1934 Act and applicable SEC rules and regulations as were the subject matter of the court case which resulted in the injunction granted on or about April 30, 1970. In addition, John Forma was charged with violations of other provisions of the 1934 Act and with violations of the anti-fraud rules promulgated by the SEC.

D. Since on or about October 1, 1975, Applicant, by use of the mails and means and instrumentalities of interstate commerce, has been offering to enter into, entering into and confirming the execution of option transactions involving commodities, and, in connection therewith, directly or indirectly, has engaged in, is engaging in or is about to engage in cheating, defrauding, and deceiving purchasers and prospective purchasers of such commodity options or has attempted, is attempting and is about to attempt to cheat, defraud and deceive such purchasers, and has made or caused to be made, and is about to make

or cause to be made, false reports or statements to such purchasers and prospective purchasers, in violation of Section 4c(b) of the Commodity Exchange Act, as amended, and Rule 30.01 thereunder, all as more fully described below:

(a) Applicant has engaged in an organized sales campaign to offer and sell commodity options to public investors residing throughout the United States through the use of deceptive brochures, pamphlets and other promotional literature and through oral misrepresentations by telephone and otherwise;

(b) As part of its sales campaign applicant made statements as to the risks involved and expected profits; whereas such representations are deceptive in that they have no reasonable basis in fact.

(c) Applicant made deceptive representations as to the safety of the investment, including that the options are registered with and "backed by" the International Commodities Clearing House or individual member firms of the London Metal Exchange.

(d) Applicant has represented, and given the appearance that Applicant acts as agent for purchasers and prospective purchasers in executing "London commodity options", when, in fact, Applicant sells, as principal, options to its customers. In connection with said deceptive and misleading practice by which Applicant held itself out as acting as agent for its customers, Applicant failed to disclose to its customers that the premium charged is "marked-up" substantially above the cost of the option to the Applicant.

E. Since on or about October 1, 1975 Applicant has been and is now, directly or indirectly, making use of the mails and means and instrumentalities of interstate commerce, for compensation or profit, to engage in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in commodities for future delivery on or subject to the rules of contract markets, and who, for compensation or profit, and as part of a regular business, issues and promulgates analyses or reports concerning commodities, while said company has not been registered with the Commodity Futures Trading Commission as a commodity trading advisor, as required by Section 4m of the Commodity Exchange Act, as amended.

F. From at least January 16, 1976 to approximately April 13, 1976 Applicant has refused Commission staff members access to applicant's books and records; said access being necessary to determine the nature of Applicant's business, and the accuracy of its registration application.

III

By reason of the allegations made by the Commission's staff, the Commission deems it necessary and appropriate, pursuant to its responsibilities under the Act, that public proceedings be instituted to determine:

A. whether the statements above set forth at Section II are true or whether other good cause exists to deny the registration of applicant.

B. whether, pursuant to Sections 4(n)7 and/or 8a(2) of the Commodity Exchange Act, as amended, the registration of the applicant should be denied.

IV

The Commission, deeming it necessary and appropriate pursuant to its responsibilities under the Act not to grant registration of the Applicant pending final determination of the questions above set forth at Section III, thus:

-7-

ORDERS that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held before an Administrative Law Judge at a time and place to be fixed as provided by Section 10.61 of the Rules of Practice under the Commodity Exchange Act, as amended, (17 C.F.R. § 10.61), and that all post hearing procedures shall be conducted pursuant to Sections 10.81 through 10.107 of the Rules of Practice (17 C.F.R. § 10.81-10.107).

IT IS FURTHER ORDERED that the Applicant shall file an answer to the allegations contained in this Complaint within 20 days after service pursuant to Section 10.23 of the Rules of Practice (17 C.F.R. § 10.23). If the Applicant fails to file the required answer or fails to appear at a hearing after being duly notified, such party shall be deemed in default and the proceedings may be determined against Applicant upon consideration of the Complaint, the allegations of which may be deemed to be true.

IT IS FURTHER ORDERED that this Complaint and Notice of Hearing shall be served on Applicant personally or by registered mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecutorial functions in this or any factually related proceedings will be permitted to partici-

pate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice.

Since this proceeding is not "rule-making", within the meaning of Section 4(c) of the Administrative Procedure Act, 5 U.S.C. § 553(c), it is not deemed to be subject to the provisions of that Section delaying the effective date of any final Commission action.

By the Commission.

/s/ William T. Bagley

William T. Bagley
Chairman
Commodity Futures Trading
Commission

DATED: Apr 10 1975

80 North Street
20
AFFIDAVIT OF RAYMOND E. BRENNAN

25

State of New Jersey)
) ss.:
County of Monmouth)

Before me, the undersigned authority, a notary public in and for said County and State, personally appeared Raymond E. Brennan, who, being duly sworn according to law, deposes and says that:

1. I am an employee of the Commodity Futures Trading Commission, an independent regulatory agency of the United States of America which maintains offices at 61 Broadway, in the Borough of Manhattan in New York.

2. At 2:00 o'clock, P.M., on Thursday, May 6, 1976, using an assumed name, I called the offices of British American Commodity Options Corp. and spoke with Mr. Stan Goldman who identified himself as a salesman of British American Commodity Options Corp.; and on the basis of such conversations I satisfied myself that British American Commodity Options Corp. was acting as a commodity trading advisor in that after I had expressed my lack of knowledge concerning commodities and commodity options, Mr. Goldman represented that British American Commodity Options Corp. could then obtain for me an option to purchase 2 December 1976 sugar calls for a period of six months at a price to be determined after receipt of my check in the amount of \$8,000 made payable to British American Commodity Options Corp. and that such underlying commodity was likely to rise in price prior to

the option expiration date. Mr. Goldman also stated that British American Commodity Options Corp. had been right on copper, coffee and rubber and he saw no reason why sugar shouldn't also go up. I asked the current price of sugar; and Mr. Goldman said it was fluctuating between 15 and 16 cents per pound and could go to 30 cents per pound very easily. He further stated that if the price of sugar went up 4 pennies, then I would recover the cost of my options.

3. At 10:30 o'clock, a.m., on Thursday, June 29, 1976, using an assumed name, I called the offices of British American Commodity Options Corp. and asked to speak with Mr. Stan Goldman. A person who identified himself as Mr. Goldman then spoke with me. I made reference to our prior conversation of May 6, 1976 and asked Mr. Goldman what he was currently recommending. He indicated that December 1976 and March 1977 sugar calls were good buys. I asked him why and he responded that the drought in Europe and poor Russian harvest would make sugar more valuable. He stated that while there were no guarantees, he felt positive that sugar will go up. He told me that a December 1976 sugar call would cost me \$3,000 and that a March 1977 sugar call would cost me \$4,000.

Raymond E. Brennan
Raymond E. Brennan

SWORN AND SUBSCRIBED BEFORE ME THIS 22ND DAY OF JULY, 1976

Albert R. Lumbach
Notary Public

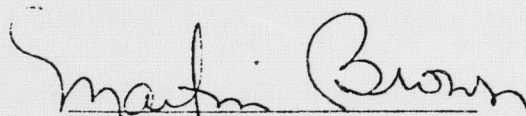
My commission expires:

ALBERT R. LUMBACH

NOTARY PUBLIC OF NEW JERSEY

Before me, the undersigned authority, a notary public in and for said County and State, personally appeared Martin Brown, who, being duly sworn according to law, deposes and says that:

1. I am an employee of the Commodity Futures Trading Commission, an independent regulatory agency of the United States of America which maintains offices at 61 Broadway in the Borough of Manhattan in New York.
2. In my capacity as an employee of the Commodity Futures Trading Commission, I am familiar with the facts and circumstances surrounding the application of British American Commodity Options Corp. to be a commodity trading advisor.
3. Based upon documents which have come into my possession in the course of my duties, I am aware of the fact that the Commodity Futures Trading Commission has refused to grant registration to British American Commodity Options Corp. until such time that a determination be made that British American Commodity Options Corp. is fit to be registered as a commodity trading advisor; and that as of the date of this affidavit British American Commodity Options Corp. is not registered in any capacity with the Commodity Futures Trading Commission.



Martin Brown

SWORN TO AND SUBSCRIBED BEFORE ME THIS 22 DAY OF JULY, 1976


Notary Public

My commission expires:

BRUCE D. RATTRAY
Notary Public, State of New York
No. 51-4301255
Qualified in New York County

AFFIDAVIT OF MARYANN CHIACCHERE

State of New York }
County of New York } ss.:

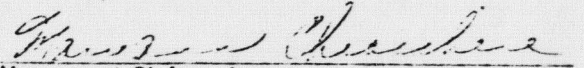
Before me, the undersigned authority, a notary public in and for said County and State, personally appeared Maryann Chiacchere, who, being duly sworn according to law, deposes and says that:

1. I am an employee of the Commodity Futures Trading Commission, an independent regulatory agency of the United States of America, which maintains offices at 61 Broadway, in the Borough of Manhattan in the City and State of New York.

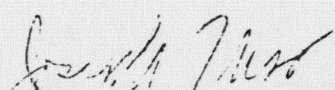
2. At 3:35 o'clock, p.m., on Thursday, May 6, 1976, using my maiden name, Maryann Riccardi, I called the offices of British American Commodity Options Corp. and spoke with a man who identified himself as Armond Bilotti, a salesman of British American Commodity Options Corp. I told him that I had no knowledge concerning commodities and commodity options. Mr. Bilotti represented that British American Commodity Options Corp. could then obtain for me an option to purchase March 1977 sugar calls, for a period of 10 months, at a price of between \$4,000 and \$4,200 per call and that such underlying commodity was likely to rise in price prior to the option expiration date. He went on to say

that a one cent move would equal \$1,120 and that option trading, though highly speculative, was also highly lucrative.

3. On the basis of the foregoing conversation, I am satisfied that British American Commodity Options Corp. was acting as a commodity trading advisor on May 6, 1976.


Maryann Chiacchere

SWORN TO AND SUBSCRIBED BEFORE ME THIS 29 DAY OF JUNE 1976.


Notary Public

My commission expires:

JOSEPH URSO
Notary Public, State of New York
No. 24-4515945
Qualified in Kings County
Cert. Filed in New York County
Commission Expires March 30, 1978

AFFIDAVIT OF BERNARD PRINCE

State of New York)
) ss.:
County of New York)

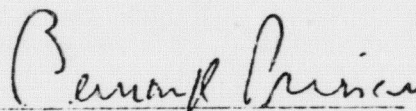
30

Before me, the undersigned authority, a notary public in and for said County and State, personally appeared Bernard Prince, who, being duly sworn according to law, deposes and says that:

1. I am an employee of the Commodity Futures Trading Commission, an independent regulatory agency of the United States of America which maintains offices at 61 Broadway, in the borough of Manhattan in New York.

2. At 12:30 o'clock, p.m., on Thursday, May 6, 1976, using an assumed name, I called the offices of British American Commodity Options Corp. and spoke with John Forma who identified himself as the president of British American Commodity Options Corp.; and on the basis of such conversation I satisfied myself that British American Commodity Options Corp. was acting as a commodity trading advisor in that after I had expressed my lack of knowledge concerning commodities and commodity options, Mr. Forma represented that British American Commodity Options Corp. could then obtain for me an option to purchase a May 1977 sugar call, for a period of one year, at a price of \$5,000 and that such underlying commodity was likely to rise in price prior to the option expiration date. Mr. Forma also stated that he believed that his company was the biggest option dealer in the country with a capital of \$750,000.

3. At 2:30 o'clock, p.m., on Monday, June 28, 1976, using an assumed name, I again called the offices of British American Commodity Options Corp. and asked to speak to John Forma. I was informed that Mr. Forma was not in the office and instead my call was referred to a Robert Stone who represented himself to be Mr. Forma's assistant. I told Mr. Stone about my prior conversation with Mr. Forma and indicated that I hadn't bought the sugar call which Mr. Forma had recommended. Mr. Stone's incredulous comment was: "You didn't buy them at the time? They went up a lot." I then told him that I didn't have a whole lot of money and asked him what British American was then recommending and the minimum I would need to invest. Because the price of sugar was likely to go much higher according to Mr. Stone, he recommended the purchase of a May 1977 sugar call, the minimum cost at which would be \$5,000.



Bernard Prince

SWORN TO AND SUBSCRIBED BEFORE ME THIS 22 DAY OF JULY, 1976



Notary Public

My commission expires:

TERESE M. DOVICH
Notary Public, State of New York
No. 41-5066900
Qualified in Queens County
Commission Expires March 30, 1978

Before me, the undersigned authority, a notary public in and for said County and State, personally appeared Laurence Youell, who, being duly sworn according to law, deposes and says that:

1. I am an employee of the Commodity Futures Trading Commission, an independent regulatory agency of the United States of America which maintains offices at 61 Broadway, in the Borough of Manhattan in New York.

2. On the basis of my examination of the records at the offices of Shearson Hayden Stone, Inc. I am aware that British American Commodity Options Corp. purchased a total of 2,173 London commodity options through Shearson Hayden Stone during the 4 months ended April 30, 1976 as follows: 277 in January, 480 in February, 560 in March and 856 in April. On the basis of my examination of certain records of British American Commodity Options Corp. I am aware that such London commodity options were resold to such firm's customers at prices averaging in excess of 50% of the sums which British American Commodity Options Corp. paid to Shearson Hayden Stone, Inc.

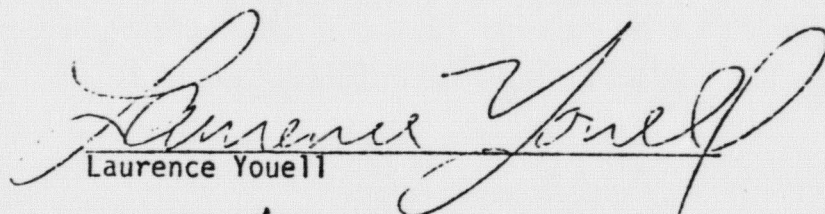
3. On May 10, 1976, I called the offices of Shearson Hayden Stone, Inc., through which British American Commodity Options Corp. purchases London commodity options for resale to its customers, and ascertained that British American Commodity Options Corp. had purchased 37 options on Monday, May 3, 1976; 15 options on Tuesday, May 4, 1976; 25 options on Wednesday, May 5, 1976; 36 options on Thursday, May 6, 1976; and 28 options on Friday, May 7, 1976; or a total of 141 options for the week ended May 7, 1976.

4. On June 28, 1976, I called the offices of Shearson Hayden Stone, Inc. through which British American Commodity Options Corp. purchases London commodity options for resale to its customers and ascertained that British American Commodity Options Corp. had purchased 190 options for the week ended May 14, 1976; 83 options for the week ended May 21, 1976; 101 options for the week ended May 28, 1976; 116 options for the week ended June 4, 1976; 171 options

for the week ended June 11, 1976; 205 options for the week ended June 18, 1976; 33
and 176 options for the week ended June 25, 1976.

5. On July 12, 1976, I called the offices of Shearson Hayden Stone, Inc., through which British American Commodity Options Corp. purchases London commodity options for resale to its customers and ascertained that British American Commodity Options Corp. had purchased 140 options for the week ended July 2, 1976 and 127 options for the week ended July 9, 1976, or a total of 1,373 options for the 65-day period subsequent to May 5, 1976 and through July 9,

6. Attached to this affidavit as Exhibits "1" through "5" are true and correct copies of promotional literature disseminated by British American Commodity Options Corp. relative to commodities in general and London commodity options in particular. Such literature came into my possession either by direct delivery to the Commodity Futures Trading Commission by personnel of British American or indirectly by having been mailed by British American to prospective customers, which customers, in turn, delivered the same to the staff of the Commodity Futures Trading Commission.


Laurence Youell

SWORN TO AND SUBSCRIBED BEFORE ME THIS 20th DAY OF JULY, 1976.


Notary Public
LESLIE A. BLAU
Notary Public, State of New York
No. 30-4523757
Qualified in Nassau County
Commission Expires March 31, 1978
My commission expires: _____

John J. Forman
Commodity Options Corp.

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LONDON COMMODITY COMMENTS

April 1976

We take great pleasure in welcoming you to the British American family. This is the first of timely Market Reports we will be sending you and we invite your comments as to content and lay out. We are also pleased to announce the opening of our Southeast Regional Division in Miami and to extend our hearty welcome to Chuck Waters, our Regional Manager and, of course, our new clients from his area.

Market research in our business is essential to maintain quality service. For this reason Ms. Carolyn Hughes (writer of this periodical) will be joining the firm June 1st as our Research Director. In the interim, she will both write and edit our Market Reports. She comes to us with the impressive credentials of Masters in Agricultural Economics from Cornell University and we are particularly pleased to have a woman of such high standards in such a sensitive position.

Our firm British American, one of the leading pioneers in Commodity Options in this country, has through our counsels, Charles Hecht, Esq. and John Lowy, Esq. been participating in open hearings in Washington. We will keep you informed as to any pertinent new legislation that is enacted.

Quality performance in our opinion is virtually a never ending learning process. For this reason we will endeavor to include in our reports a "Helpful Hints Column", which will stress technical know-how, such as our current article, "Use of the Put as Well as the Call" and also a break-down of the London Market, Commodity by Commodity. You will notice that there will be times when we won't have an opinion or when within the organization we will have divergent views. We will endeavor at that time to show both views and let you the investor-speculator make the decision.

This report and future reports should be taken as they are intended, as aids, not as the final deciding factor. The final deciding factor is and should be you.

Sincerely,

John J. Forman

John J. Forman
President

EXHIBIT "1" TO AFFIDAVIT

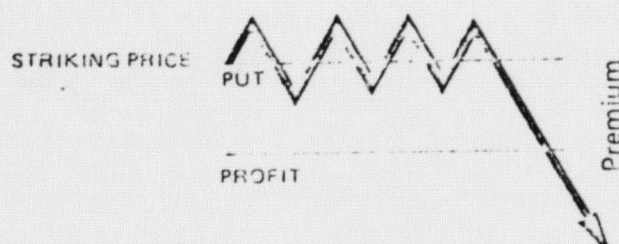
HELPFUL HINTS

Use of the Put as well as the Call

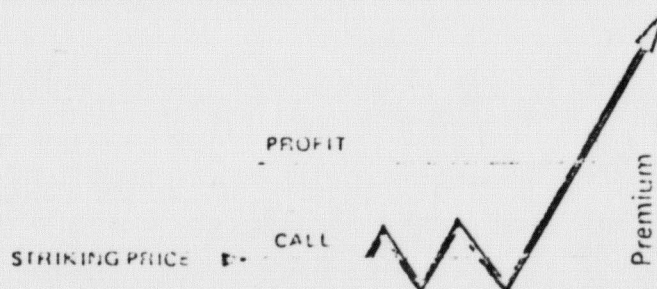
When a commodity appears on the charts at a peak after a sustained run-up or when production estimates exceed consumer demand by a large margin, a commodity can be adversely affected. In this case, the opinion of the investor is that the commodity will move down, therefore, the Put vehicle would be used so that profits could be realized on the anticipated down side move.

The put option, the opposite of a call option, is considered by many a negative approach to investing. However, when indexes are at a high point (peak) on the charts, one should stop to think — How can I profit. Sophisticated money works continuously, therefore, we recommend this unusual but unique tool — the put option, as applied to specific commodities.

EXERCISING A PROFITABLE PUT OPTION: Basically the same as above, except in exercising a put option you would automatically assume a short position and you would simultaneously cover your short position with a corresponding long futures position. Your gross profit would be the difference between the Striking price and current trading price of the long futures. **EXAMPLE:**



EXERCISING A PROFITABLE CALL OPTION: When the difference between the "basis" or striking price of your option and the current trading value of the futures price of your selected commodity is greater than the Premium cost of your option, you may exercise for profit anytime before declaration date. Notify your representative of your desire to exercise — he will so instruct the exchange trader — which action will automatically give you a long London futures position and simultaneously you will also instruct the trader to Off Set (or liquidate) your long position by taking a short position in futures thereby cancelling out your original position. Your net profit, being the difference between the option Striking price and current futures trading price less the premium. **EXAMPLE:**



SUGAR

It is our opinion that sugar prices will move higher influenced by such factors as improved demand for sugar from refiners and dealers, the attempt of industrial sugar users to build their stock for warm weather demands and the recently announced 1976 poor harvest by Russia. The reports of flood damage to Colombia cane will further cut back on the supply of sugar creating positive price conditions.

COFFEE

According to the Journal of Commerce, Tuesday, March 16th, a series of disasters coupled with a projected short fall for the 1976-77 coffee crop has caused the reduction in the supply of coffee, thus pushing up prices. These accumulated disasters of floods, drought and war has also had an impact on transportation thus further pushing up prices. It was also estimated in the same Journal of Commerce article that by the end of the 1976-77 season stocks of coffee will "be something below 25 per cent of the 1977-78 consumption". We have seen a substantial rise in the price of coffee since we first recommended it in October; we still feel that the full impact of the low supply has yet to be felt to its fullest.

However, the last few days dramatic upward movement could peak out. For the time being we would recommend clients already in coffee to start taking profits on part of their positions and to watch for possible lower prices for re-investment.

COCOA

According to the Futures Market Service, March 5th, 1976 #10, one of the main underlying factors holding up the price level of this commodity is the effective manner in which African countries have marketed their supply of cocoa. It is reported that a technique of holding back supplies when the market is weak and selling when it is strong is being used, both of which increase prices.

In the March 26th commentary of the Futures Market Service regarding the U.S. Market, it was stated: "Monday, March 22nd (the day when the March futures delivery expired) was a key day for the cocoa market. The March futures contract closed out at 74.00 as longs continued to squeeze the shorts. The expiration price was about 6 cents above the May contract and compared with 56.70 for the March, 1977 delivery representing a premium of more than 17¢. The undeniable strength of the spot position reflected the scarcity of deliverable grades in the spot market.

Manufacturers apparently are working with relatively light inventories. Consumer demand continues to show gradual improvement. Thus, nearby futures should continue to maintain substantial premiums. The well balanced world supply demand picture suggests that this (spot premium) condition could continue for quite a while."

SILVER

Given the lows and highs of silver prices since January, it is difficult to speculate on the direction of prices. Demand and supply factors still look routine and until some definite position occurs in this market, we will maintain a neutral position.

COPPER

A number of factors have lead to recent strength in copper. Recently, as experienced by one of our Associates traveling in London, some of the British traders have gone long on Copper in anticipation of their many currency devaluations. Political conflict in Mozambique and Angola can have a profound effect on production, and in our opinion, have and will lead to further increased prices. In this country, as in other countries, construction and copper go hand in hand. With the world recession receding into the past, it is our opinion that copper will be a definite purchase.

RUBBER

It is expected that prices will begin to climb particularly in the light of the recovery of auto sales in the last 6 months. It is also expected that other manufacturing sectors will shift demand in an upward direction. With the increased use of rubber in the tire industry for use in radial tires and auto sales recovering we believe that rubber for the next 9 months should be acquired and held.

TIN

Tin and steel go together like love and marriage, one is a natural consequence of the other. Recently, the steel industry in the U.S. and abroad have shown signs of recovery. The indication is not strong enough at this point to indicate a purchase. However, keep in touch with your representative for probably change of opinion.

LEAD

Demand for lead depends to a large extent on the demand for automobiles, with the recent recovery in the automotive industry and coupled with the relatively low premium price we believe that lead would be an attractive buy for the beginning investor speculator.

ZINC

At the time of this writing there was not enough definitive information written to venture an opinion. In other articles we will endeavor to be better prepared to deal with this commodity.

*British American
Commodity Options Corp.*

HOME OFFICE
80 WALL STREET
New York, N.Y. 10005
(212) 344-3000

SOUTHEAST REGIONAL DIVISION
Dixie Land Towers
9250 South Dixie Road Bldg. 1
Miami, Fla. 33156
(305) 661-3679

RUBBER

RUBBER ON ROAD TO RECOVERY?

We at BRITISH AMERICAN believe so!

The year at hand:

1976 should see rubber rebound to levels that make entry into the rubber market very enticing at this time.

The 1974-75 period which just ended saw a stabilization take place which in our opinion will act as the spring board for bullish action in the current year. The automobile industry which accounts for 60% of all rubber production has forecast a record or near record year in 1976. This should breed a parallel performance by the rubber industry, especially, that radial tires require natural rubber for best results. Another favorable factor is the slackening of petroleum based synthetic rubber which has priced itself out of the market due to continuing high oil prices.

World inventories are currently on balance with the reduced usage of recent years and will need beefing up should industry demands accelerate, as is expected.

WORLD RUBBER CONSUMPTION AND PRODUCTION
IN THOUSAND TONS

	June 1975	May 1975	June 1974	% Change June 1975 vs May 1975	% Change June 1975 vs June 1974
Total New Rubber Consumption	208,426	204,810	259,662	+ 1.80	- 19.70
Synthetic Rubber Consumption	153,402	149,300	199,363	+ 2.75	- 23.05
% Synthetic Rubber Consumption	73.53%	72.90%	76.78%		
Natural Rubber Consumption	55,024	55,510	60,299	- 0.75	- 8.63
Total Synthetic Rubber Production	149,776	153,623	212,517	- 2.51	- 29.52
Reclaimed Rubber Consumption	9,542	8,677	12,430	+ 9.97	- 23.30

Source: The Rubber Manufacturers Association.

CONCLUSION & OPINION:

In light of the above our research department suggests that rubber be bought for all medium to long term aggressive portfolios.

This summary is not and under no circumstances to be construed as an offer to sell or a solicitation of an offer to buy the commodities herein named. The factual information contained herein has been obtained from sources believed to be reliable, but is necessarily not all inclusive, and is not guaranteed as to accuracy, and is not to be construed as a representation by us. Expressions of opinion are subject to change without notice.

BEST COPY AVAILABLE

WE AGREE ! SUGAR PRICES WILL MOVE HIGHER . Influenced by reports of improved demand for sugar from refiners and dealers at somewhat improved prices, and by Licht's 82.8 million ton second estimate of 1975/76 world sugar production vs. an earlier forecast of 84.8 million tons. There were reports of flood damage to Colombian cane, and a substantial reduction in forecasts for the 1975/76 Brazilian cane crop because of adverse weather conditions.

As of this writing, it is impossible to evaluate the full scope of the Angolan war and its effect on the African continent which supplies the world with 10% of the total cane sugar output.

Also, Russia has recently announced a poor 1976 harvest. It should be noted that Eastern Europe produces 40% of the worlds total beet sugar output.

Opinion and Recommendation:

In our opinion all of the above spells higher world sugar prices for 1976. We therefore recommend mid to long term 'long' positions.

65¢ per lb. 1974 HIGH



ANTICIPATED
BREAKOUT LEVEL

ORIGINAL OCTOBER FIGURES WORLD SUGAR PRODUCTION - F.O. LIGHT -thousand metric tons, raw value-

		Estimated	NEW EST.
Beet Sugar	1974-75	1975-76	
Western Europe	12,196	14,262	} LOWER
Eastern Europe	12,191	13,326	
Total Europe	24,387	27,588	
Other Continents	5,398	6,158	
World Beet Sugar	29,785	33,746	← LOWER
Cane Sugar			
Europe	30	30	
North & Central Amer.	14,373	14,856	
South America	12,395	12,051	← LOWER
Africa	5,496	5,474	← LOWER
Asia	14,567	15,374	
Oceania	3,202	3,289	
World Cane Sugar	50,063	51,074	← LOWER
World Total	79,848	84,820	← LOWER

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NEW YORK TIMES

Commodity Options Corp.

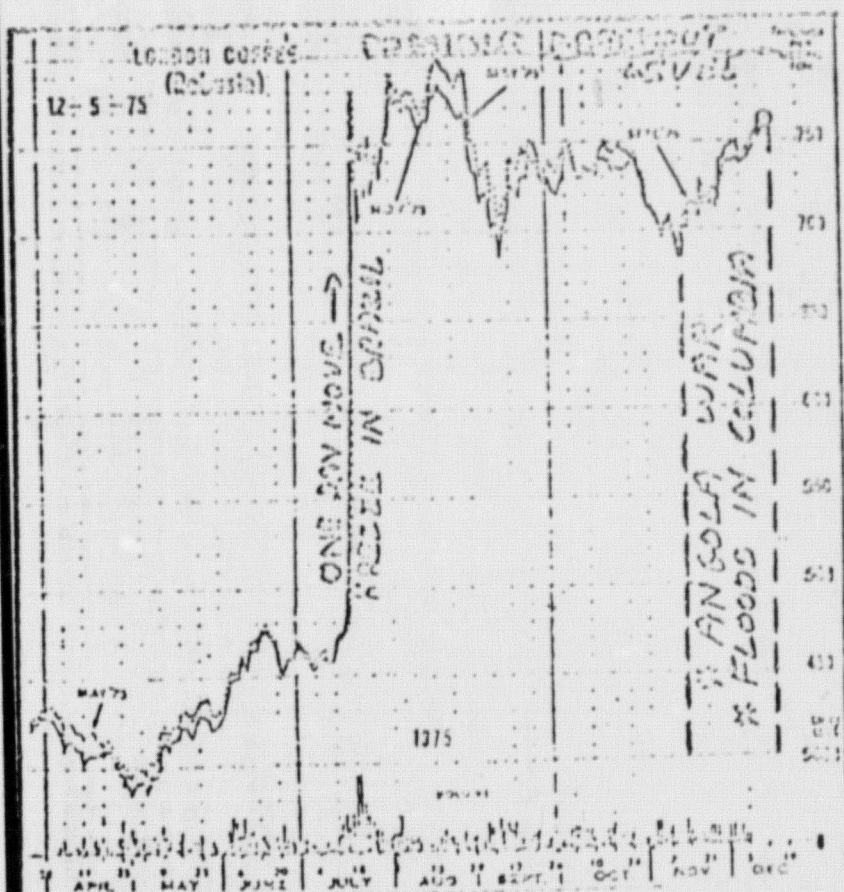
80 Wall Street

New York, N.Y. 10005

40

- * WAR IN ANGOLA !
- * FLOODS IN COLOMBIA !
- * RECENT FREEZE IN BRAZIL !

Will COFFEE Go HIGHER ???



WORLD OPINION ?
* PROBABLY.

OUR OPINION ?
* YES !

IS IT MOVING UP NOW ?
* YES !!

TIMING IS EVERYTHING -
CALL US NOW.

This summary is not and under no circumstances to be construed as an offer to sell or a solicitation of an offer to buy the commodities herein named. The factual information contained herein has been obtained from sources believed to be reliable, but is necessarily not all inclusive, and is not guaranteed as to accuracy, and is not to be construed as a representation by us. Expressions of opinion are subject to change without notice.

Price of Coffee Futures Shoots Up As Producers Reduce Inventories

By JOHN VALENZUELA
Sung Reporter of THE WALL STREET JOURNAL

The move clears the way for what the producers obviously hope will be a strong run-up in coffee prices - spurred by the devastating freeze in Brazil in July and recent reports that Colombia may have lost 30% of the current season's coffee crop because of excessive rains.

In the key New York cash market, Colombian green coffee beans currently are selling for about 9½ cents a pound; that's up from 6½ cents in mid-September but still less than the record \$1.01 just after the July frost. Brazilian coffee is being offered at 83 cents a pound, up from 5½ cents last week. Central American and African coffee prices have risen lately, too, but not as much.

U.S. roasters last raised their wholesale prices for ground and instant coffee in October. Current prices don't fully reflect this latest rise in green coffee prices, trade sources say.

	Clos.	Net Chg.	Yr. Ago
New Jones Futures	271.13	+ 1.75	254.20
New Jones Spot	293.14	- 0.37	281.85
London United Kingdom ..	1160.5	+ 5.5	1150.4

New York dealers said it was confirmed Friday that producing countries had sold more than 300,000 bags (of 132 pounds each) held in U.S. warehouses. Some of this may end up in the hands of U.S. roasters, but most of it was bought by European roasters, trade sources said. A week before, more than 600,000 bags were sold to European roasters from Brazilian Coffee Institute warehouses in Trieste.

Producing countries acquired this coffee earlier this year. Attempting to support world market prices, they bought maturing futures contracts on the New York Coffee & Sugar Exchange and accepted delivery of the coffee. The producers shipped nearly two-thirds of it to Trieste in an effort to insulate it from the U.S. market, but that tactic didn't relieve the pressure of these supplies on prices.

• Then the July frost hit Brazil, prices
• jumped and the warehoused coffee sud-
• denly became very valuable. Producing
• countries have been reluctant to sell coffee
• since the freeze, except in very small quan-
• tities at very high prices. Until 10 days or so
• ago, they refused bids for the stored coffee.

Dealers say the sales will spur rather than damp demand for green coffee beans. For one thing, they say, one million bags amount to only slightly more than a two-week supply for European roasters, who have surpassed the U.S. as the world's largest users of green coffee. Also, the stored coffee is expected to fill the roasters' immediate needs for hard-to-get Brazilian and African beans rather than satisfy on-going demand for top-quality Central American and Brazilian coffees. (Political problems in Africa, mainly Ethiopia and Angola, have disrupted production and shipments.)

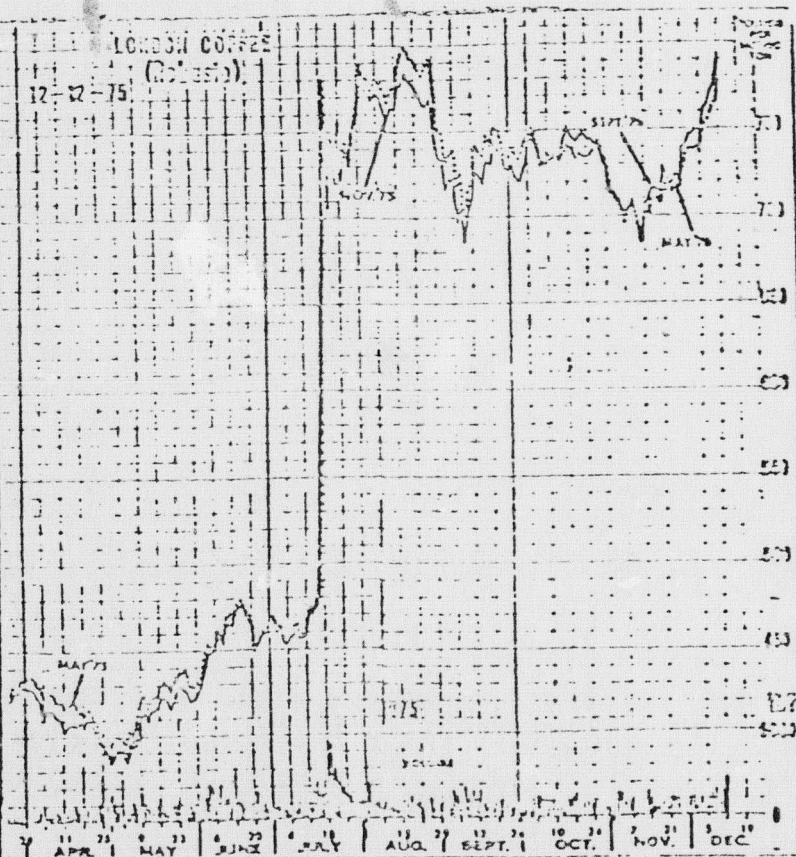
World Coffee Price Facts Approved
NEW YORK TIMES · DECEMBER 4, 1975

LONDON, Dec. 2 (AP)—The and eventually this would pro-
33-nation International Coffee sumably bring prices down before three years to the
Organization approved today a plan to the benefit of the cup the shortage caused it
world coffee pact that for the July by a fact that the
first time included concern 50 percent of the coffee the
When it becomes effective in March at
on Oct. 1 next year, the pact reduces the country's capex
coffee to the consumer in times well exceeds without the capacity to a trickle.

[illegible]

The new International Coffee Agreement removes the price and government to handicaps that have long plagued coffee exporters. It allows them to sell their coffee on the world market at prices which would have been impossible only a few years ago.

The information set forth herein was obtained from sources which it is believed to be reliable but not guaranteed as to its accuracy. Neither the information, nor any opinion expressed, constitutes a solicitation for the purchase or sale of any securities or commodities.



British American

Commodity Options Corp.

80 Wall St. New York, N. Y. 10005

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42 London Commodity Options

a guide

The introduction to the United States of options on commodities traded in London, England, provides Americans with a vehicle limited risk venture into the volatile international commodities scene. Those unacquainted with this field will want answers to certain fundamental questions:

- *Just what is a London Commodity Option?*
- *What is the advantage to taking an option as opposed to taking a contract of the same commodity?*
- *What do the technical terms --such as "striking price", "premium", etc. mean?*
- *What kind of risk is involved in the purchase of London Commodity Options?*
- *On what specific Commodities are London Commodity Options available?*
- *Who stands behind these London Commodity Options?*
- *In general, what is the tax treatment for London Commodity Options?*

BEST COPY AVAILABLE

WHAT IS A LONDON COMMODITY OPTION?

A London Commodity Option is the right to buy or the right to sell on London Commodities Markets a set amount of a commodity at a set price, within a set period of time.

A London call option gives the right to buy one contract at the current market price (striking price).

A London put option gives the right to sell one contract at the current market price (striking price).

A call option is a right to buy. A put option is a right to sell. The striking price is the base price of an option - the price at which the purchaser has the option to buy or sell the commodity future contract.

WHY BUY LONDON COMMODITY OPTIONS?

Options offer an opportunity for potentially large profits from a relatively small and fixed outlay of capital -- in short, "high leverage." The premium, or cost, of an option is a percentage of the price of a commodity contract. The premium is the principle cost to the option holder no matter if the value of the commodity moves adversely to his position. In contrast, a speculator who buys or sells a commodity contract on margin will often be asked to put up additional funds, should the market turn against him.

An individual may choose to purchase either a call or put option depending on his analysis of market prospects for the commodity in question.

WHEN DOES A LONDON COMMODITY OPTION BECOME PROFITABLE?

Since the premium paid for an option is a fixed amount, the option becomes profitable when the price of the underlying contract in question rises or decreases by more than the premium paid.

1. In the case of a call option, when the price of the commodity rises above the strike price of the underlying contract by more than the premium.

2. In the case of a put option, when the price of the commodity falls below the strike price of the underlying contract by more than the premium.

WHAT IS RISKED IN THE PURCHASE OF LONDON COMMODITY OPTIONS?

The premium paid for the option is all that is at risk. The premium is non-refundable, and is paid for all the time up to the expiration date, when the option runs out. The option buyer should consider whether the time period of the option is long enough to allow for profitable fluctuation in the market price of the commodity. If not, sometimes it is wiser to buy a commodity for a longer term

option than to try to save on premium cost by buying a less costly option of shorter duration.

UNPROFITABLE OPTIONS

While the entire premium is at risk, if the value of the underlying contract is above - in the case of a call, or below in the case of a put, it is quite often possible to recoup all or part of the premium.

ON WHAT SPECIFIC COMMODITIES ARE LONDON COMMODITY OPTIONS AVAILABLE?

As market conditions permit, London soft commodity options are available in SUGAR, COFFEE, COCOA, RUBBER and WOOL. Hard commodities are available in SILVER, COPPER, TIN, LEAD and ZINC.

WHO STANDS BEHIND THESE LONDON COMMODITY OPTIONS?

Options on soft commodities traded in London are registered with and backed by the International Commodities Clearing House (a member of the United Dominions Trust Group of Companies.) Hard commodity options are registered with and backed by individual member firms of the London Metal Exchange.

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LONDON MARKETS COMMODITY OPTION TRADING FACTS

IN GENERAL WHAT IS THE TAX TREATMENT FOR LONDON COMMODITY OPTIONS?

If the purchaser permits the option to expire unexercised, it is treated as if it were sold on each date (declaration date) for nothing: therefore, if held for six months or less, the loss is treated as a short-term capital loss; if held for more than six months, it's a long-term capital loss.

If the option is exercised and simultaneously the corresponding commodity future is sold, in the case of a call, or bought, in the case of a put exercised - the gain or loss is short-term, no matter how long the option had been held.

However, if the option, instead of being exercised, is sold, the gain or loss on the sale would be short or long-term depending upon the length of time the option was held by the investor: if held six months or less, it's short-term; if held more than six months, it's long-term.

There are further sophisticated tax techniques in the use of this investment vehicle. We suggest you consult your tax advisor as to your individual tax treatment.

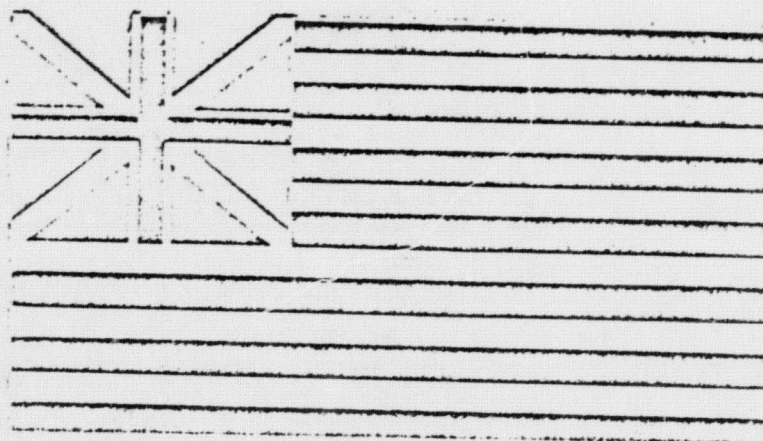
Commodity	Exchange	Contract Size	Contract Month	How Quoted
SUGAR	United Ter. Mkt. Assn. of London	50 Tons (112,000 lbs.)	Mar., May, Aug., Oct., Dec.	Pounds Stg. & Dec. Per Long Ton
COFFEE (Robusta)	Coffee Term. Mkt. Assn. of London	5 Metric Tons (11,023 lbs.)	Jan., Mar., May, July, Sept., Nov.	Pounds Stg. & Dec. Per Metric Ton
COCOA	London Cocoa Term. Mkt. Assn.	10 Metric Tons (22,046 lbs.)	Mar., May, July, Sept., Dec.	Pounds Stg. & Dec. Per Metric Ton
RUBBER	London Rubber Term. Mkt. Assn.	15 Metric Tons (33,068 lbs.) Per 3 Mths. Cont.	(Jan., Feb., Mar.) (Apr., May, June) (July, Aug., Sept.) (Oct., Nov., Dec.)	Pence & 20ths of Pence Per Kilogram
WOOL (Greasy)	London Wool Term. Mkt. Assn.	1,500 Kilograms (3,307 lbs.)	Mar., May, July, Oct., Dec., up to 17 mths. ahead	Pence Per Kilogram
SILVER	London Metal Exch.	10,000 Troy Ounces	Spot, Three, Six & Twelve Mths. forward ahead	Pence & Tenths of Pence Per Troy Ounce
COPPER	London Metal Exch.	25 Metric Tons (55,115 lbs.)	Spot, Three, Six & Twelve Mths. forward ahead	Pounds Stg. & Dec. Per Metric Ton
TIN	London Metal Exch.	5 Metric Tons (11,023 lbs.)	Spot, Three, Six & Twelve Mths. forward ahead	Pounds Stg. & Dec. Per Metric Ton
LEAD	London Metal Exch.	25 Metric Tons (55,115 lbs.)	Spot, Three, Six & Twelve Mths. forward ahead	Pounds Stg. & Dec. Per Metric Ton
ZINC	London Metal Exch.	25 Metric Tons (55,115 lbs.)	Spot, Three, Six & Twelve Mths. forward ahead	Pounds Stg. & Dec. Per Metric Ton

*Trading from 1977 March contracts onwards, London sugar will be in metric tons.

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London Commodities Options

a guide



THE UNION JACK FLAG IS A SYMBOL OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

British American

Company Limited

INCORPORATED IN

THE UNITED KINGDOM OF GREAT BRITAIN

AND IRELAND

British American

Company Limited

British American

Commodity Options Corp.

80 West Street

New York, N. Y. 10005

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Guatemala at a Glance

Vital Statistics—Guatemala is a country of 42,040 square miles, slightly smaller than Pennsylvania, with coastlines of about 200 miles on the Pacific Ocean and 70 miles on the Caribbean Sea. It is bounded by Mexico to the north and west, by Belize on the east, and by Honduras and El Salvador to the east and south. Inland from a region of lowlands along the Pacific coast, many volcanoes rise steeply, thousands of feet above the land. The tallest, Tajumulco, is 13,846 feet high.

A monsoon climate, with heavy rainfall in the summer, exists along the Pacific coast and on the volcanic highlands. In the capital city, Guatemala, the average temperature is 65 degrees and at sea level about 78 degrees.

Population—Out of approximately 5.85 million people about 41 percent are Indians; the rest are almost entirely ladino, people of Spanish-Indian ancestry who are Westernized in culture. Ladinos take the lead in public affairs.

Spanish is the official language, but approximately 18 Indian languages are spoken and are primary languages for almost half the people. The literacy rate is less than 50 percent.

The Roman Catholic church claims 90 percent of the population. There are some Protestants. Among the Indians, elements of indigenous religions persist and are tied to concerns about agricultural fertility.

History—Guatemala was conquered by Spain in 1524, which time magnificent cities of the Maya Indians had already been deserted. It remained a colony of Spain until 1821. Before becoming an independent republic in 1847, it was a part of the Mexican Empire and then a state in the Central American Federation.

From 1954, when a left-wing government was overthrown—with United States assistance—through the early 70's, political life was fraught with violence. There were military coups, terrorist activity and political murders, including the killing of the United States Ambassador in 1963 and the slaying of West Germany's Ambassador in 1970.

After elections in 1974, Gen. Kjell Eugenio Laugerud Garcia was installed as President, replacing Carlos Arana Osorio, who had held office since 1970. The President has executive and legislative power. There is a single chamber legislature and a Supreme Court. The present Constitution came effective in 1965. The Communist Party has been outlawed.

Guatemala contends that Belize—a self-governing British colony, formerly called British Honduras—should be part of the country and has been seeking negotiations with Britain on this issue. The situation has produced considerable tension along the border.

Economy—The country's economy is based on agriculture, with coffee, cotton, bananas and sugar constituting 54 percent of all exports in 1974. Historically, a few wealthy families have owned most of the arable land, and official statistics show that 2.1 percent of the farms occupy 62.5 percent of the farmland, while 74.9 percent of the farmers own a total of just 11.7 percent. Most of the peasants live in primitive conditions, many of them in villages without electricity and inaccessible by road.

Fishing, textiles, chemicals, minerals, metals, furniture and food-processing are other major areas of economic activity.

The basic unit of currency is the quetzal, which is equivalent to one American dollar.



Many casualties in quake were reported in Guatemala's capital and interior towns. In Honduras, heavy damage was reported in San Pedro Sula and Puerto Cortés.

28 THE WALL STREET JOURNAL,

Commodities

Thursday, February 5, 1976

...Belgium would meet that country's import health requirements, traders said.

COFFEE: An earthquake in Guatemala and continued strength of cash prices spurred renewed buying of futures contracts, brokers said. Trade sources said reports from Guatemala indicated the temblor may have been the worst ever to hit that country, which is the third largest coffee-growing nation in Central America. The sources said it wasn't known if coffee-producing areas had been damaged. However, transportation, handling and dealings in coffee could be disrupted even if only Guatemala City was affected, the sources said.

Colombia was reported to have sold green coffee beans at a record \$1.04 a pound, up about one cent from previous sales, dealers said. No business was reported in Brazilian coffee, and exporters there were said to be asking \$1.10 a pound and more. Brazilian green beans recently sold at a record \$1.08 a pound, according to dealers.

Coffee, Rice, Barley, Soybeans, Flaxseed, Bran, Linseed, Cottonseed, Corn, Hemic, Meal, Brew, Alfalfa

Cotton, Corn, Soybeans, Peanut, Coconut, Lard, Tallow, Tallow, Grease, Linseed

Cotton, Print, Sheet, Burlap, Wool, Saffron

Charles Harris, Esq.
Jay B. Grossman, Esq.

Attorneys for the
Commodity Futures Trading Commission

2033 K Street, N. W.
Washington, D. C. 20581

Telephone: (202) 254-7424

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Leslie Blau, Esq.
c/o Commodity Futures
Trading Commission

61 Broadway
New York, New York 10006

Telephone: (212) 264-1700

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Commodity Futures Trading Commission,

Plaintiff,

-vs.-

British American Commodity Options
Corp.,

Defendant.

Docket No.

76 CIV 3247 CBM

AFFIDAVIT AND ORDER
FOR APPOINTMENT TO
MAKE SERVICE PURSUANT
TO RULE 4(c) OF THE
FEDERAL RULES OF
CIVIL PROCEDURE

State of New York

) ss.:

County of New York

Before me, the undersigned authority, a notary public in and for said County and State, personally appeared Charles Harris, who, being duly sworn according to law, deposes and says that:

1. I am Special Counsel to the Division of Enforcement of the Commodity Futures Trading Commission, an independent regulatory agency of the United States of America and a member of the bar of the Commonwealth of Pennsylvania.

2. In such capacity I am familiar with the facts and circumstances giving rise to the complaint filed at the above-captioned number and term.

3. I request that Alvaro Galli, Laurence Nebesny and Philip Rix, each of whom is an adult member of Plaintiff's staff 18 years of age or older and is not a party to this action, be appointed to effect service upon Defendant British American Commodity Options Corp. of the Summons and Complaint filed in this matter.

4. I aver that a substantial savings in time and expense will result from permitting the persons named at paragraph 3 to effect service.

Charles Harris

SWORN TO AND SUBSCRIBED BEFORE ME THIS 22 DAY OF JULY 1976.

Theresa M. Borsch

Notary Public

TERESA M. BORSH
Notary Public, State of New York
No. 48-0761-00
Qualified in Queens County
Commission Expires March 30, 1977

My commission expires

DATED: New York, New York, July , 1976.

Clerk

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

76 Civ. 3247

BRITISH AMERICAN COMMODITY
OPTIONS CORP.,

Defendant.

----- x
B e f o r e :

HON. LEE P. GAGLIARDI,
District Judge

New York, New York
October 6, 1976
11:15 a.m.

APPEARANCES:

CHARLES HARRIS, Esq.,
LESLIE A. BLAU, Esq.,
Attorneys for Plaintiff

CHARLES J. HECHT, Esq.,
and
GUSKAE, GREENE & KAPLAN, Esqs.,
Attorneys for Defendant
BERT L. GUSRAE, Esq.,

of Counsel

(Case called)

MR. HARRIS: Ready, your Honor.

MR. HECHT: Ready, your Honor.

THE COURT: All right.

Before we proceed, gentlemen, I want to read into the record my decision with respect to what has gone one before and what we face.

The decision is as follows:

Plaintiff Commodity Futures Trading Commission (CFTC) moves for a preliminary injunction to enjoin defendant British American Commodity Options Corp. (British American) from making use of the mails or any means or instrumentality of interstate commerce in violation of Section 4m of the Commodity Exchange Act, as amended (the Act). 7 U.S.C. Section 6m.

In a footnote I set forth the provisions thereof.

The defendant cross-moves to dismiss the action pursuant to Rule 12(b)(1), (2) and (6) Federal Rules of Civil Procedure, for lack of jurisdiction and for the failure of the complaint to state a claim upon which relief can be granted.

This court has jurisdiction under Section 5c of the Act, 7 U.S.C. Section 13a-1, where the defendant

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transacts business within this district or where alleged violations of the Act have occurred within this district.

For the reasons stated herein, the court denies defendant's motions to dismiss and orders an evidentiary hearing to determine whether British American should be enjoined from doing business as a commodity trading advisor pending the conclusion of the administrative proceeding now ongoing.

Plaintiff CFTC is a duly constituted independent regulatory agency of the United States of America which, since April 21, 1975, has been charged with the responsibility for administering and enforcing the various provisions of the Act. 7 U.S.C. Section 1 et seq.

Defendant British American, incorporated under the laws of the State of New York in October 1975, is engaged in the purchase and sale of London Commodity options, which are options to purchase certain commodity futures contracts.

This court heard oral argument on all of the motions in this case on September 24, 1976. Certain facts, necessary to the determination of the motions in this case, were stipulated to by the parties on the record or in their papers submitted to the court. These facts are set forth in chronological order.

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On or about March 3, 1976 the Division of Enforcement of the CFTC orally advised the defendant that it was the CFTC's position that defendant qualified as a "commodity trading advisor" under Section 2(a) of the Act, 7 U.S.C. Section 2, and should register with the CFTC as required by Section 4m of the Act, supra.

Thereafter, on March 17, 1976, British American, without conceding that the CFTC had jurisdiction over its activities, filed an application for registration on Form CFTC 5-R. The application was returned with a request for additional biographical data. The application was resubmitted on March 23, 1976.

On April 16, 1976 the CFTC filed a "Complaint and Notice of Hearing pursuant to Section 4(n)7 amd 9a)2_ of the Commodity Exchange Act, as amended." 7 U.S.C. Sections 6(n)7 and 12a(2).

The Complaint alleged that the defendant is unfit to be registered as a commodity trading advisor. The final determination of this question was referred to an administrative law judge and a prehearing conference is scheduled to take place before Administrative Law Judge Hunt on October 8, 1976.

The CFTC in the Complaint stated that it deemed it appropriate not to grant registration to the

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2 defendant pending final determination of the administrative
3 hearing. The instant claim was instituted here in
4 this court by order to show cause on July 22, 1976.

5 At the outset, the defendant British American's
6 motions to dismiss the CFTC's action must be denied in
7 all respects. The doctrine of primary jurisdiction has
8 no application to this motion for a preliminary injunction.
9 The pendency of an administrative proceeding is irrele-
10 vant.

11 CFTC specifically seeks to enjoin the defend-
12 ant from doing business pending the final determination
13 of the administrative proceeding. Section 6c of the Act,
14 supra, allows the CFTC to bring such an action in federal
15 court and the specific language of the Act, as described
16 in detail below, allows the CFTC to act before the ad-
17 ministrative proceeding is completed. See Section 8a(2)(B)
18 and (c) of the Act, supra.

19 As set forth below, until British American
20 is registered it is prohibited by the Act from doing
21 business as a commodity trading advisor. Because of the
22 CFTC's action under Section 8a(2) of the Act, British
23 American cannot be registered unless and until after a
24 hearing its fitness to be registered is determined.

25 This action only seeks to preliminarily enjoin

1 the defendant until there is a final determination in that
2 hearing. If it is in the public interest to stop British
3 American from doing business, CFTC need not wait, while the
4 unregistered defendant makes unauthorized transactions,
5 until the administrative hearing is complete. As such,
6 on the face of its complaint, the CFTC has stated a cause
7 of action.
8

9 The Commodity Futures Trading Commission Act
10 of 1974 authorizes the CFTC to seek injunctive relief in
11 the appropriate United States District Court to enjoin
12 violations of provisions of and rules promulgated under
13 the Act and to enforce compliance with the Act. Section
14 6c of the Act, supra.

15 This court, before it can grant the requested
16 preliminary injunction, must first review the CFTC's ac-
17 tions to determine whether they comply with the require-
18 ments of the Act. If the court finds that the CFTC's
19 actions are in compliance with the Act, it must then, in
20 accordance with the standards established in this Circuit,
21 set the matter down for an evidentiary hearing, as it is
22 doing today, to independently judge the need for a pre-
23 liminary injunction. And the appropriate citations are:
24 SEC v. Management Dynamics, 515 F.2d 801, pages 806 and 807;
25 SEC v Frank, 388 F.2d 486, at pages 491-92; and

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CFTC v J. S. Love & Associates, 76 Civ. 928, in the Southern District of New York, this year.

The court must first examine the statutory language and relevant legislative history and CFTC rules and regulations. Section 4n(2) of the Act, 7 U.S.C. Section 6n(2), is the starting point of an examination of CFTC's claim that British American is not registered. That section provides as follows:

"Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission, or within such shorter period of time as the Commission may determine."

This automatic registration provision is not affected where the CFTC, in accordance with the "as hereinafter provided" language acts within thirty days.

In this case a question has arisen as to whether the registration period began on March 17 or March 23, 1976, which is the date of the amended application. Even with the first date applicable, the CFTC's actions on April 16, 1976 are within the required thirty-day period. Under the CFTC Rules of Practice Chap. 1 Section 10.5, the date of filing is not included in the computation of time. 41 Federal Register 2512, filed on January 16, 1976.

Consequently, the CFTC action is within the thirty days to prevent the automatic registration under Section 4n(2) of the Act.

A careful examination of the statute shows that CFTC's actions on April 16, 1976 satisfy the "as hereinafter provided" exception to 4n(2). First, while the Act is unclear as to whether the "as hereinafter provided" language applies only to Section 4n or to the entire Act, the legislative history makes it clear that the language means "as provided elsewhere in the Act." Senate Report No. 93-1131, 93rd Cong. 2d Sess. Section by Section Analysis, Section 205(1974).

The CFTC therefore properly alleges that it is acting pursuant to Section 8a(2) of the Act, supra. Specifically, under Section 8a(2)(B)(ii) of the Act, the CFTC is:

Authorized to refuse to register any person... if it is found after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made,...(ii) for other good cause shown.

While this language appears to require a hearing prior to the denial of registration, Section 8a(2)(C)

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2 of the Act specifically states. "Provided, that pending
3 final determination under clause (b) or (C), registration
4 shall not be granted." The initial decision not to grant
5 registration can be made by the CFTC prior to any hearing
6 being required.

7 I have a footnote 6 at that point which I am
8 not going to read at this point but will be inserted in
9 the record.

10 (6. The statutory language covering the
11 requirement and timing for a hearing under the
12 Commodities Exchange Act, as amended, is very dif-
13 ferent from the more specific language in other
14 regulatory acts. For example, Section 11 of the
15 Securities Exchange Act, as amended, 15 U.S.C. Sec-
16 tion 78o(1975), specifically requires that a regis-
17 tration hearing for brokers and dealers be held
18 and concluded within 120 days of the date of filing
19 the application for registration (to be extended up
20 to 90 additional days for good cause). 15 U.S.C.
21 Section 78o(b)(1)(B). While the CFTC's failure to
22 hold a timely hearing is not a violation of the
23 Commodities Exchange Act, it may in some instances
24 be violative of constitutional due process. This
25 court notes, however, that in this case to date there

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2 have been no unreasonable delays in the holding of
3 the hearing and because British American has been
4 allowed to trade while not registered, there could
5 in any case be no prejudice due to postponements
6 in the hearing.)

7 This clear meaning of the Act is reinforced
8 in the legislative history, which states:

9 "In determining whether to register an
10 applicant for a full period, the Commission may
11 refuse to grant such registration for any of
12 the reasons specified in Section 8a(2) of the
13 Commodity Exchange Act, as amended and the
14 Commission may do so 'pending final determination'
15 as provided in that section. Senate Report No.
16 94-73, 94th Cong. 1st Sess. 5(1975)."

17 Once CFTC determined that British American
18 is a "commodity trading advisor" and denied its application
19 for registration for what it determined to be "good cause
20 shown," CFTC could properly allege that British American's
21 use of the mails or any means or instrumentality of inter-
22 state commerce in connection with its business as a
23 commodity trading advisor was in violation of Section 4m
24 of the Act, supra. The CFTC could properly bring an
25 injunctive proceeding in this court to restrain such use

of the mails or interstate commerce pending a final determination of the administrative proceeding. Section 6c of the Act, 7 U.S.C. Section 13a-1.

This court must determine if there are proper grounds for granting a preliminary injunction in this case and accordingly is prepared to proceed with the evidentiary hearing.

It is so ordered.

MR. HECHT: Your Honor, I prepared a short opening statement. I would like to know if both sides will be given that opportunity.

THE COURT: Certainly, yes.

MR. HARRIS: Plaintiff has no preliminary opening statement, your Honor.

MR. HECHT: May it please the Court, with respect to this evidentiary hearing, I would like to point out that the defendant believes that the plaintiff will not be able to prove that British American is a commodity trading advisor as that term is defined by Section 2a of the Act.

The second point is that this is a unique case in many respects. There is no fraud alleged, there are no customer affidavits or anything in any way showing that the company has improperly handled its customers,

1
2 improperly dealt with the public, and to the contrary, in
3 connection with its motion, defendant filed documentary
4 evidence of all completed transactions, whether profits,
5 losses or break-even, with its motion.

6 The plaintiff has been given the opportunity
7 if it so desires to have those books made available to
8 them.

9 I once again extend that offer if the Court
10 feels it appropriate. Because of the volume of the books
11 and to cover any question of any possible improprieties,
12 if someone from the staff of the Commission wants to be
13 present while those particular facts are reviewed which
14 we submitted documentation on, I have no objection, pro-
15 vided the staff does not take notes with respect to the
16 names and addresses of our customers.

17 It should be pointed out, and we will point
18 out if in fact the plaintiff gets past its burden of
19 proof, that this is not a situation where the defendant
20 has avoided its obligation to file a registration state-
21 ment. This is a new statute, it is a new law, and the
22 evidence will show clearly that the CFTC knew of the de-
23 fendant's existence from just about the very day it opened
24 its doors. They came in. They said, "We don't know
25 whether or not we have jurisdiction, but we would like to

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look at your books."

My client permitted them to look at the books. They made another request. We permitted them again.

My client consulted counsel. Counsel's position was that British American was not registered.

In February correspondence ensued between Mr. Gusrae, who is general counsel to the company, where he advised the staff in writing that it was his firm's opinion that they had no jurisdiction, the CFTC.

The CFTC responded and said, "We believe we have jurisdiction."

A meeting was set up in Washington on March 3. At that meeting the pros and cons of registration were discussed and on March 17 the defendant filed its registration statement.

There is no allegation in the complaint and I don't believe the staff even contends that the application was not submitted in good faith, that the application was not full and complete in all substantial parts.

The question here, and the equities, are very simple. Where was the plaintiff this last year? Why did they let the defendant build up a substantial well-run business with close to two thousand customers who are operating at a profit? What about the customers'

property rights?

The defendant does not charge when a customer closes out its transaction. What do these customers do if they want to exercise their options? They have no place to go. Oh, there will be someone around on the street who will close out the transaction for a substantial fee. But what about the customers? And as you know, the CFTC has conducted the questioning of customers.

That's a subject of another litigation which I understand the Court has declined to rule on at this time.

I would like to reserve our rights with respect to the primary jurisdiction argument, and we understand that the evidentiary hearing has been ordered, but we reserve our rights.

THE COURT: On what basis do you say that you are not within the jurisdiction of the CFTC and not required to register?

MR. HECHT: We are not required to register as a commodity trading advisor, your Honor.

Back in March we explained to the Commission we felt that there was a mistake in the statute. The way the statute is drawn, it was intended to cover commodity options, because if you go back in the legislative history,

the birth of this statute was the Goldstein-Samuels situation out in California back in 1970 and 1971.

What happened in that case is Goldstein-Samuels wrote what is called naked options. What they did is they took the customer's money for premiums on options but they never executed the purchase of those options through the London Exchanges, and, of course, as in all pyramid schemes, the house of cards fell.

As a result they amended the Commodity Exchange Act.

The defendant's position there to the CFTC was "Look, the Act does not specifically cover us. However, let's face it, it is in the public interest that this industry be regulated, as long as it is reasonably regulated and properly regulated. It serves our clients' best interests, it serves the public's best interests, and there are people in the industry who should not be permitted to operate."

Unfortunately when the statute was drafted, with the exclusions and everything else, the place the staff felt we should register as, even though there was no place technically where we could register, was as to a commodity trading advisor.

We told them then that we are not in the

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business of giving advice for compensation. We are a broker. We buy and we sell commodity options. We execute every option.

Not only have they inspected us on numerous occasions, they have also checked at Shearson Hayden Stone, and we buy every option which we get from a customer.

Another question is what about the customers? They have been treated fairly. They are doing well. I mean, all the broker can do is give them an opportunity to do well, a fair shake at the stake. Whether they make or lose money, we can't guarantee that. Fortunately for my client and fortunately for its customers, they have done exceedingly well, as the documentary evidence shows, which we have filed with the Court.

All we are saying is that we have no objection, never have had any objection, that the CFTC should regulate this industry. We think that is what the statute really intended. And we explained that position to Mr. Harris and Mr. Schief and Mr. Weiss when we were down in Washington in March.

However, we wanted to preserve our rights, in case the Commission changed its mind, that we would be protected.

Giving an example, on October 4, 1976, which

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2 was this Monday, Barron's wrote an article where the
3 CFTC has devised a new set of proposed rules for London
4 commodity option dealers where it is absolutely impos-
5 sible to operate.

6 When Barron's questioned the CFTC and said,
7 "The way this works there is no dealer in the world that
8 can ever stay in business," the CFTC's comment, and also
9 at the Public PLI Conference up here on the 31st of Sep-
10 tember, was "Well, we want to put them out of business."

11 My position to this Court is if a man is
12 running a proper business-- the statute was designed and
13 was amended to particularly cover commodity options -- all
14 I am saying is what is the public interest? What do you
15 accomplish by putting British American out of business
16 pending its administrative proceeding, which I think the
17 Court will see is a fully litigated proceeding.

18 That's all. I am saying that the plaintiff
19 cannot prove by the preponderance of the evidence that
20 it is in the public interest to put British American out
21 of business pending the conclusion of the administrative
22 process.

23 Thank you.

24 MR.HARRIS: Unless the Court prefers that
25 I respond to Mr. Hecht at this time, I would like to

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reserve response until the conclusion of plaintiff's case.

THE COURT: My only thought is this: In the first instance, are they subject to this by reason of what they do or not?

MR.HARRIS: We intend to put witnesses on the stand on that point, your Honor.

THE COURT: Very well.

MR. HARRIS: So I would prefer to reserve my comment until the conclusion of my case.

THE COURT: Sure.

MR.HARRIS: Plaintiff calls Allen Cooper.

A L L E N C O O P E R, called as a witness
by the plaintiff, being first duly sworn, testified
as follows:

THE COURT: Proceed.

DIRECT EXAMINATION

BY MR. HARRIS:

Q Mr. Cooper, where do you live?

A I live at 5704 Farragut Road, Brooklyn, New
York 11234.

Q How old are you?

A I am 32 years old.

Q What is your occupation?

A I work for the Commodity Futures Trading

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Cooper-direct

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2 Commission at One World Trade Center, Suite 4747, New
3 York, New York 10048.

4 THE COURT: All right.

5 We don't need all that.

6 Q What are your duties at the Commodity Futures
7 Trading Commission?

8 A My duties are that I am in charge of the
9 processing of applications for registration of all com-
10 modities trading advisors and commodity pool operators
11 in the entire nation, and I am also in charge of the
12 processing of applications for registration from futures
13 commission merchants and floor brokers in the eastern
14 region.

15 MR. HARRIS: Would you please mark this for
16 identification, Plaintiff's No. 1.

xx 17 (Plaintiff's Exhibit 1 marked for identi-
18 fication)

19 Q Mr. Cooper, I hand you a document that has been
20 marked as Plaintiff's Exhibit No. 1 for identification and
21 ask you whether you can identify that document.

22 THE COURT: We don't have a jury here. We
23 might save a lot of time if you would show it to your
24 adversary in the first instance and then mark it right
25 in evidence, rather than marking it for identification.

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Cooper-direct

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2 MR. HECHT: Right.

3 THE COURT: What is it?

4 MR. HECHT: We stipulate that we filed and
5 that is a true copy--

6 THE COURT: This is a true copy of the appli-
7 cation filed by the defendant?

8 MR. HECHT: Sure.

9 THE COURT: Very well.

10 Let's do this in that way and save a lot of
11 time. It will be received in evidence.

12 (Plaintiff's Exhibit 1 received in evidence)

13 THE COURT: This was filed on what date?

14 THE WITNESS: This application was hand-
15 delivered to me and Mr Howard G. --

16 THE COURT: What date?

17 THE WITNESS: March 18, 1976.

18 THE COURT: All right. That's the date of
19 filing, right?

20 THE WITNESS: Yes.

21 THE COURT: All right.

22 Q Was that application processed upon receipt?

23 A No, that application was returned to the
24 applicant because they were missing the biographical
25 information form for the branch office manager of the

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Cooper-direct

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Florida office, a Mr. Chuck Waters.

Q What happened to that application?

A The application was returned to the applicant and on March 25 the completed application with Mr. Waters' biographical information form was received in the Eastern Regional Office.

THE COURT: Is this Mr. Waters who lives in Larchmont?

MR. HECHT: No, your Honor. He lives in Miami, Florida.

THE COURT: Did he formerly live in Larchmont?

MR. HECHT: Not from the information he gave us, his residences for the last ten years.

THE COURT: I do have a very close personal friend by the name of Chuck Waters who lives in Larchmont.

MR. HECHT: He worked for the General Land Company. I will check with Mr. Forma.

He worked for the General Development Corporation.

THE COURT: Evidently it is not the same person.

MR. HECHT: Thank you, your Honor.

Q Do you know what happened to that application after it was resubmitted to you?

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Cooper-direct

1 A After it was resubmitted to me, we processed
2
3 the application by initiating a fitness check with the
4 FBI and the Securities Exchange Commission.

5 Q What was the final ^{disposition}~~decision~~ made of that
6 application?

7 A Final disposition was that the Commission,
8 Commodity Futures Trading Commission, did not grant regis-
9 tration to the British American Commodity Options Corp.

10 MR. HECHT: Your Honor, I would like to file
11 an objection, that the hearing and the complaint speak
12 for themselves, and I don't think it is fair for anyone to
13 characterize it, and they have not established that he is
14 an expert in this area.

15 THE COURT: I think these are some facts that
16 have been stipulated. These facts have already been stipu-
17 lated, what he has testified to.

18 MR. HECHT: To a degree, but I think he is
19 putting a different inference on them and rephrasing them
20 not the way the notice of hearing says.

21 THE COURT: After resubmission the application
22 has not yet been approved, is that correct?

23 THE WITNESS: That is correct.

24 THE COURT: All right.

25 Q Is the defendant British American Commodity

Options Corp. registered with the Commodity Futures Trading Commission?

A No.

Q When was the last time you verified that fact?

A I verified it this morning before coming to this courtroom with Mr. --

THE COURT: That's all right. This morning.

MR. HARRIS: I could ask whether Mr. Hecht will stipulate to the admission of this next document, a copy of which I have just given him.

MR. HECHT: I will tell you what, Mr. Harris. Why don't we do this? At the same time you admit this, why don't you admit your copy of your prehearing memorandum, my prehearing memorandum, and the Judge's order with respect to the terms of the prehearing memorandum, so the Court has a complete file on the administrative proceeding.

MR. HARRIS. I have no objection to any of the documents that you just mentioned being admitted. I do not have a copy of my prehearing memorandum with me today.

MR. HECHT: I brought an extra one for the Court. This way we can stipulate as to the present status of the administrative proceeding.

THE COURT: Why don't you put them in the proper

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Cooper-direct

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2 order and number them seriatim.

xx

3 (Plaintiff's Exhibits 2,3,4,5 received in
4 evidence)

5 MR. HARRIS: I have no further questions of
6 Mr. Cooper.

7 MR. HECHT: Your Honor, I have a few questions.
8 I just have to get one thing.

9 THE COURT: All right.

10 MR. HECHT: Your Honor, maybe it is a good
11 idea Mr. Blau has suggested, and I agree, to identify
12 the specific documents for the record.

13 THE COURT: All right.

14 Exhibit No. 2 is the opinion of Judge Hunt.

15 Exhibit No. 3 is the motion to resettle the
16 prehearing order, decision on the motion.

17 No. 4 is the prehearing memorandum of the
18 plaintiff here.

19 No. 5 is the prehearing memorandum of the
20 defendant here.

21 CROSS-EXAMINATION

22 BY MR. HECHT:

23 Q Mr. Cooper, do you recall that in the middle
24 of March that you personally met me?

25 A Yes, I do.

1
2 Q Where did we meet?

3 A We met at the Commodity Futures Trading Com-
4 mission's office at 61 Broadway in Manhattan.

5 Q Do you recall what we discussed when I filed
6 that application?

7 Would this refresh your recollection? Maybe
8 this document, which I will identify as a letter to the
9 Commodity Futures Trading Commission, dated March 17--
10 would this refresh your recollection?

11 A Yes, I believe I have a copy or the original
12 in my bag.

13 Q Fine. That would be even better.
14 Do you have the original with you?

15 A Yes.

16 MR.HECHT: Do you have any problem if we
17 stipulate that a copy is submitted into evidence on this?

18 THE COURT: Defendant's Exhibit A?

19 MR.HECHT: Yes, your Honor.

20 MR. HARRIS: If it is a copy.

21 Q Why don't you check and compare that to the
22 original?

23 A Yes, this is a copy of the original.

24 (Defendant's Exhibit A received in evi-
25 dence)

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Cooper - cross

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Q Mr. Cooper, would you please refer to that?

In that connection, do you recall what we discussed?

A Just that you were filing-- you were submitting the application for your client, British American Commodity Options Corp.

Q Do you recall that we had a meeting with a Mr. Brown, who was the Assistant Regional Administrator?

I believe his name was Martin Brown.

A I believe that you met Mr. Brown before you came to my office and after you came to my office we went in to a Mr. Howard G. Bodenhamer, who, at that time was the Deputy Regional Administrator, and we brought these applications to his attention.

Now, you may have met with Mr. Brown prior to coming into my office.

Q With respect to this latter conference, didn't we discuss the applicant's application for confidential treatment and the procedures to be followed?

A Yes, we did.

Q To your knowledge, has the Commodity Futures Trading Commission ever notified respondent that its application for confidential treatment was denied?

A I am not aware of such notification.

Q With respect to the application form, I believe you testified that it was sent back because the biographical data of Mr. Waters was not included, is that correct?

A That is correct.

Q Would you please look on the form itself, and in particular item 10 and 11, and would you please read that to the Court, what that requires, because if it is correct, doesn't that define who must file biographical data information?

A Item 10 and 11?

Q Yes.

Look at the caption at the head.

A Item 10 says "List investment organizations in which you or your partners, officers, directors, or persons performing similar functions or owners of 10% or more of your capital stock have any degree of ownership, control or management authority and from which you receive reimbursement for trading plans and other forms of advice."

Item 11 pertains to educational institutions. Do you want me to read that?

Q No. The point is, as the person at the CFTC who is responsible for reviewing these applications, isn't the requirement that someone furnish biographical data with respect to anyone who is a partner, officer, director, or

10% stockholder?

A In the instructions to this application, as I pointed out to you, when you were in my office, it says "all partners, officers, directors, owners of 10% or more of the applicant's capital stock or the proprietor, if a sole proprietor, branch office manager" which includes Mr. Chuck waters, "or persons performing similar functions of any of the aforementioned persons must file biographical information on Form 94, a supply of which is attached."

Q But it was explained to you that Mr. Waters had just joined the company and wasn't an officer, director or stockholder.

A But you did tell me that he was a branch office manager and that's how the application was filed.

Q We have discussed it and I think I said he was the person responsible, the most responsible person at the regional office, but you were going to discuss that and then get back to me?

A No, I told you that same day --

THE COURT: Is this really relevant?

MR. HECHT: It is in a way, your Honor. The application was filed -

THE COURT: I don't have a problem with that.

1
2
3 It was filed on the 18th and the decision was
4 rendered on April 16, notification was given on April 16,
5 which was within the 30-day period.

6 MR. HECHT: Except I think there is some
7 question on the exact date of filing.

8 THE COURT: It doesn't make any difference
9 whether it is the 17th, the 18th or the 23rd, really.

10 MR. HECHT: Under your decision, your Honor,
11 it doesn't make a difference, but I think we should
12 complete the record.

13 THE COURT: I don't see why we should get
14 into extraneous matters.

15 MR. HECHT: If the Court so directs, I have
16 no further questions.

17 THE COURT: All right.

18 Anything further?

19 MR. HARRIS: Nothing further, your Honor.

20 (Witness excused)

21 MR. HARRIS: Plaintiff calls Maryann Chiacchere.

22 M A R Y A N N C H I A C C H E R E, called as a
23 witness by the plaintiff, being first duly
24 sworn, testified as follows:

25 THE COURT: Proceed.

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Chiacchere-direct

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DIRECT EXAMINATION

BY MR. HARRIS:

Q Where do you live?

A 2345 East 2nd Street, Brooklyn, New York.

Q And how old are you?

A 25.

Q What is your occupation?

A I am an investigator with the Division of Enforcement of the Commodity Futures Trading Commission in the Eastern Regional Office.

Q And where is the Eastern Regional Office located?

A One World Trade Center.

Q What do your duties entail as an investigator?

A I examine firms and individuals who are required to be registered under the Commodity Exchange Act.

Q At my direction, have you made contact with British American Commodity Options Corp.?

A Yes, I have.

Q When was the last time that you made such contact?

A Yesterday afternoon.

Q Can you relate to the Court what the nature

jh:mg

Chiacchere-direct

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1 and other witnesses we are prepared to show that the de-
2 fendant is giving commodity trading advice and does come
3 within the definition of a commodity trading advisor inso-
4 far as our statute is concerned, and therefore must be
5 registered, and all that this witness is testifying to is
6 to the conversation that she had yesterday with one of the
7 defendant's salesmen.
8

9 THE COURT: All right. I will take it. It
10 is being offered solely for that limited purpose.

11 MR. HARRIS: That is correct, your Honor.

12 A Mr. Montez told me that because Brazil and
13 Colombia would not be willing to export, they would hold
14 back the coffee until the price reached what they wanted
15 it to get up to and then they would export, but that
16 would be the reason for the price of coffee to go up that
17 high and that was why it would be a good investment.

18 He also told me that for every penny that
19 the price of coffee moved up, I would make \$110.

20 That was the whole conversation.

21 I told him that I would get back to him at
22 a later date.

23 Q In the course of that conversation did you
24 discuss the defendant's fees or commissions?

25 A I asked him if there was a commission for

jh:mg

Chiacchere-direct /cross

33

trading against the option and he said that was included in the premium price of the option, which was \$3500.

Q Did he disclose the amount of the commission?

A No.

MR. HARRIS: I have no further questions.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. HECHT:

Q Miss Chiacchere -- I hope I am pronouncing your name correctly.

Is that the correct way to pronounce it?

A Chiacchere.

Q Miss Chiacchere, do you recall the affidavit you filed in connection with the plaintiff's complaint in this action?

A Yes.

Q Isn't it a fact that when you called back you used an assumed name?

A I used my maiden name.

Q Is that located anywhere in the phone book?

A No.

Q How many years have you been employed by the CFTC?

A I started my employment there when it was the

jh:mg

Chiacchere-direct

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of that contact was?

A I telephoned the firm and I spoke to a Patrick Montez and I asked Mr. Montez about the options that the firm sells and I asked him if he could tell me an option that would be good to buy, and he said that at present he would recommend coffee, a September 1977 coffee option, and he said that the option would cost \$3500, and I asked him why he thought it would be a good investment, and he said that he felt that the price of coffee would rise from its present price of \$1.38 per pound to about \$2.50 to \$3.00 per pound, and I asked him what he based this on, and he said that Brazil had decided to stop exporting coffee and Colombia had already stopped exporting coffee.

MR. HECHT: Your Honor, I would like to object at this time and move to strike such testimony.

It is not responsive to any of the issues framed in the complaint, which are two-fold: (a) is British American a commodity options trading advisor, and (b) is it in the public interest to put British American out of business.

What they are trying to do is to allege through the back door something that is not in the complaint.

MR. HARRIS: Your Honor, through this witness

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Chiacchere-cross

1 CEA and I was-- I am employed for a little over three
2 years.
3

4 Q Would you say that you are fairly knowledgeable
5 about commodities and commodity options?

6 A Yes.

7 Q Isn't it a fact that you represented to
8 British American in May that you were not knowledgeable
9 about commodities and commodity options?

10 A If that's what the affidavit says, yes.

11 MR. HECHT: Your Honor, I would like to
12 introduce her affidavit as Defendant's Exhibit B.

13 Before I do that, you want to stipulate to
14 it or do you want me to go through the identification?

15 THE COURT: Have it marked.

16 (Defendant's Exhibit B received in evidence)

17 Q Isn't it a fact that that is a misstatement
18 of fact that you made to British American?

19 A Yes.

20 Q Is it standard operating procedure for investi-
21 gators of the CFTC to utilize assumed names?

22 A At the time that I made the phone call I was
23 instructed to use an assumed name or a name other than the
24 name I usually use.

25 Q Is this the first time you have ever done that;

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Chiacchere-cross

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1 was this the first time you had ever done that?

2 A Yes.

3 Q Is it now your practice at the Commission to
4 use assumed names?

5 A I don't really understand what you mean by
6 our practice.

7 Q As an investigator, other than British Ameri-
8 can, have you used an assumed name in investigating any
9 other company?

10 A No.

11 Q Thus, in fact, British American has been
12 treated as an exception by your particular portion of
13 the agency?

14 MR. HARRIS: I object, your Honor.

15 THE COURT: Yes. Sustained.

16 Q When you called yesterday, did you use an
17 assumed name?

18 A Yes.

19 Q Did you also represent to the employee of
20 British American that you were not knowledgeable in com-
21 modities or commodity options?

22 A No.

23 Q When he explained the price to you, didn't he
24 explain to you that the option would have to go up so much
25

jh:mg

Chiacchere-cross

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1 in value in order for you to recoup your premium?

2 A He didn't explain that. I don't know why he
3 did not, but he did not.

4 Q Did you ask him how the option worked?

5 A No, because of the fact that I said I was
6 knowledgeable, I didn't ask him how it worked.

7 Q Have you made any other calls to British
8 American besides the two you have testified to?

9 A Yes, once towards the end of September.

10 Q Did you use an assumed name on that occasion?

11 A No.

12 Q You used which, your maiden name, or your
13 present name?

14 A My present name.

15 Q In any of those conversations did you ever
16 ask the employee of British American whether or not they
17 charged a fee for their opinions, advice or analysis with
18 respect to commodities futures contracts or commodities?

19 A No, not for their opinion, I didn't ask that
20 question.

21 Q Is it your understanding that they charge for
22 that opinion or that they make their money by the differ-
23 ence between what they pay for an option and what they sell
24 the option for?
25

1 A I really don't have an understanding as to
2
3 whether they charge for their opinions.

4 Q Then there is no basis for your statement in
5 your affidavit that you concluded that they are a commodity
6 trading advisor, is there?

7 A Well, as the Commission feels that people who
8 sell options are commodity futures-- are commodity trading
9 advisors.

10 Q But isn't that statute clear, and I am sure
11 you have studied it in your three years -- what you are
12 saying is anyone who gives advice with respect to commodity
13 options ipso facto becomes a commodity trading advisor?

14 A I think that that is more or less the Commis-
15 sion's opinion.

16 Q I respectfully submit that this would make
17 me an advisor even if it was incidental to my business.

18 What I am saying is, don't a lot of people
19 work as brokers, they buy a commodity for X dollars and
20 they sell it for X plus a certain amount of dollars, and
21 their investment advice, as you say, or analysis, that's
22 incidental to their basic business?

23 A I think the statute defines what a commodity
24 trading advisor is and that it is not incidental to the
25 business; it is the business.

1 Q It says "engaged in giving analysis and advice
2 for compensation."

3
4 I mean, every broker who trades in securities
5 or bonds or stocks, obviously he is giving advice to
6 his clients on the investment merits of a certain situa-
7 tion.

8 Does that make him an investment advisor?

9 A I am not knowledgeable in the laws on bonds
10 and stocks and that type of thing.

11 Q Commodities?

12 A I think we have to stand with the wording of
13 the statute.

14 MR. HECHT: Your Honor, at this stage counsel
15 should not be making comments while I am cross-examining
16 the witness, or facial expressions.

17 THE COURT: I have not noticed any, but I
18 have not been paying attention.

19 MR. HECHT: Mr. Gusrae pointed out that Mr.
20 Blau was. Let the witness just testify. That's all we
21 can ask.

22 THE COURT: All right.

23 Q But you have never made any independent determina-
24 tion that British American charges anything for its
25 "analysis or advice or opinions on commodities and commodity

jh:mg

Chiacchere-cross

39

1 futures," have you?

2 A Independent of the money -- independent of the
3 charges to buy options?

4 Q Right.

5 A No, I have not.

6 Q In fact, aren't you aware that they don't
7 charge for investment advice?

8 A I am not aware one way or the other.

9 MR. HECHT: I have no further questions, your
10 Honor.

11 THE COURT: Anything further?

12 MR. HARRIS: Nothing really, your Honor.

13 THE COURT: All right. You may step down.

14 (Witness excused)

15 THE COURT: Next witness.

16 MR. HARRIS: Plaintiff calls Bernard Prince.

17 BERNARD PRINCE, called as a witness

18 by the plaintiff, being first duly sworn, testified
19 as follows:

20 DIRECT EXAMINATION

21 BY MR. HARRIS:

22 Q Where do you live, Mr. Prince?

23 A Brooklyn, New York.

24 Q What is your age?

A About 60.

Q What is your occupation?

A Futures trading specialist employed in the Enforcement Division of the Commodity Futures Trading Division.

Q How long have you been so employed?

A About six years.

Q What are the nature of your duties?

A Primarily involved with the enforcement of the Act itself.

Q At my direction have you had occasion to contact the defendant British American Commodity Options Corp.?

A By telephone, yes.

Q When was the most recent time that you contacted them?

A Yesterday.

Q What was the nature of the conversation that you had and with whom did you speak?

A A person answered the phone and I asked to speak with a salesman. He stated that he was a salesman, identified himself as a Pat Montez.

I told him that I was interested in commodity options and could he give me some information in that area.

After speaking with him for about three or four

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Prince-direct

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minutes, he stated that he recognized my voice and that he believes I had previously spoken to him.

I admitted that I did speak to him about three or four weeks ago.

At that time he said that he was very reluctant to give me any information because the firm had been receiving phone calls from people whom they could not identify and were becoming very suspicious about giving information over the telephone.

I then asked him what had happened to the commodities -- to the options, rather, which he had recommended about three or four weeks ago, namely, sugar and coffee.

He stated that he regretted that I had not invested in both sugar and coffee because both of them have gone up considerably in price and I would have made a considerable amount of money had I taken his advice at that time.

MR. HECHT: Your Honor, I would like to state the same objection as before, this is admitted solely for that limited purpose.

THE COURT: It is taken solely for that limited purpose.

MR. HECHT: Thank you.

1
2 A At that point he said that he would no longer
3 continue the conversation and wanted to meet with me in
4 person and that British American is open for business
5 from I believe he said 9 o'clock in the morning until
6 6:30 in the evening.

7 He asked me where I was employed and I told him
8 I worked on 47th Street, which was not true, and he said
9 that if I could arrange to be there before 6:30 he would
10 be glad to meet with me.

11 Q In your prior conversation with Mr. Montez
12 what did you discuss?

13 A We discussed the investment of options and he
14 had recommended at the time a purchase in coffee and
15 sugar.

16 Q Did he tell you why he was recommending coffee
17 and sugar?

18 A Because he had expected some government inter-
19 ference on the part of both coffee and sugar and thought
20 that the price would rise.

21 Q Did you discuss at any time with Mr. Montez the
22 fee structure or commission structure that would be as-
23 sessed against you?

24 A No, only the total cost of the contract.

25 MR. HARRIS: No further questions.

jh:mq

Prince-cross

CROSS-EXAMINATION

BY MR. HECHT:

Q Mr. Prince, how are you today?

A Fine. How are you?

Q Fine, thank you.

Do you recall preparing an affidavit on July 22, 1976 in connection with this proceeding?

A Yes.

Q Is that a true copy of your affidavit?

A Yes.

Q Was that affidavit filed with this case?

A Yes.

MR. HECHT: I would like at this time to move to admit this as Defendant's Exhibit C.

THE COURT: Any objection?

MR. HARRIS: No objection, your Honor.

(Defendant's Exhibit C received in evidence)

Q Isn't it a fact that when you called the defendant on May 6 that you utilized an assumed name?

A May I have the benefit of that photocopy?

Q Just answer my question.

A Yes.

Q Isn't it a fact that you also misrepresented to that employee that you were not knowledgeable concerning

1 commodities and commodity futures?

2 A I may have stated that I was not experienced
3 in commodity futures.
4

5 Excuse me. In options, not in commodity futures.

6 Q In fact you are experienced in that area, you
7 understand that area, don't you?

8 A Which area are you talking about, options or
9 commodity futures?

10 Q Options, commodity options, commodity futures.

11 A I have not had personally very much experience
12 with options. I have had experience with commodity
13 futures, which is the area that I am working in primarily
14 in the office.

15 Q But you have far more experience and knowledge
16 than the average person on the street with respect to
17 commodity options, don't you?

18 A I would say so.

19 Q It didn't bother you to represent to the company
20 that you had no knowledge in this area? Your affidavit
21 specifically says "My lack of knowledge concerning com-
22 modities and commodity options."

23 Look at it again.

24 Doesn't it bother you that you have to get on
25 the phone and misrepresent yourself that way?

1
2 A Yes, it does.

3 Q Is this a standard method of operations for
4 you in the course of your duties?

5 A This is the first time I have ever employed
6 this.

7 Q Did you employ this on your own or were you
8 directed to?

9 A I was directed to do so.

10 Q If you had to do it again, would you use an
11 assumed name?

12 A If I was so directed.

13 Q When you called Mr. Montez yesterday why did
14 you give him the wrong address?

15 A I didn't give him an address yesterday.

16 Q You said 47th Street.

17 A Oh, 47th Street.

18 Q That is not your real address?

19 A Because I wanted to appear as if I couldn't
20 come there very quickly in response to his time limita-
21 tion that he placed.

22 Q Don't you think that if a customer is sincerely
23 interested in a commodity option or commodity or whatever
24 it is, futures, don't you think it is proper for the
25 salesman to say, "I would like to meet you"? Doesn't it

1 jh:mc

Prince-cross

2 help sometimes to say, "Eyeball to eyeball, I would like
3 to meet you and talk it over with you"?

4 There is nothing wrong with that, is there?

5 A No.

6 Q It's good business practice sometimes, isn't
7 it?

8 A Except that the reason he gave me at the time,
9 that they had been receiving suspicious telephone calls
10 and for that reason he wanted to meet with me in person
11 rather than over the telephone.

12 Q These documents in connection with your af-
13 fidavit have been a matter of record now since July 27.

14 You think it was improper for me as counsel
15 to tell the company that people were calling up, using
16 assumed names, misrepresenting themselves and using
17 entrapment techniques? Don't you think it is reasonable
18 to say to the company?

19 You could always walk over there. Mr. Harris
20 has been over there, you know that. Mr. Youell has come
21 in a number of times. Have they ever had any problem
22 at the company in getting information?

23 A None that I know of.

24 Q Did you ever ask Mr. Montez or the gentleman who
25 you spoke to in your affidavit whether or not British

1 jh .

Prince-cross

2 American charges separately for trading advice, analysis
3 and opinion?

4 A No.

5 Q Therefore, there is no basis to your statement
6 that they "a commodity trading advisor"?

7 A Well, if a person recommends to me to buy a
8 certain option at a certain price I would say he is giving
9 me advice.

10 Q You have futures commission merchants. You are
11 familiar with them, aren't you?

12 A Yes.

13 Q A future commissions merchant, doesn't he give
14 advice with respect to his opinions on commodities in the
15 course of his duties?

16 A Yes.

17 Q But he is not required to register as a com-
18 modity trading advisor, is he?

19 A Well, I don't prepare the registration as far
20 as the Act is concerned.

21 Q You have bought and sold stocks before, haven't
22 you?

23 A Yes.

24 Q You have dealt with a broker?

25 A Yes.

1
2 Q Does that broker give you opinions with re-
3 spect to what he thinks a security is going to do?

4 A On occasion he does.

5 Q Are you aware--

6 MR. HARRIS: Objection, your Honor, as to
7 relevancy and materiality.

8 THE COURT: I will permit it.

9 Q Are you aware that that broker himself is not
10 registered as an investment advisor?

11 A No, I am not.

12 Q Would it surprise you if I told you that he is
13 not registered as an investment advisor with the Securities
14 and Exchange Commission?

15 A It would make no impact on me.

16 Q Can I ask you a question? When you called
17 Mr. Montez, wasn't it a fact that when Mr. Montez wanted
18 to discuss it further you said, well, you really don't
19 want to discuss it on the phone?

20 A No, I didn't. He suggested to me that I come
21 down and meet with him in person.

22 Q If in fact you were a legitimate person who had
23 an interest in commodity options that would be a reason-
24 able request, wouldn't it?

25 A I guess so.

1 MR. HECHT: I have no further questions.

2 MR. HARRIS: No further questions.

3 THE COURT: All right.

4 Next witness.

5 (Witness excused)

6 MR. HARRIS: Plaintiff calls Laurence Lese.

7 MR. HECHT: Your Honor, I think we should
8 all approach the bench.

9 THE COURT: Maybe we can excuse the witness.

10 MR. HECHT: Fine.

11 (Pause)

12 MR. HECHT: Your Honor, it is my understanding
13 that Mr. Lese is going to testify with respect to Mr.
14 Forma's prior SEC problems.

15 MR. HARRIS: That is incorrect.

16 MR. HECHT: That was my understanding.

17 THE COURT: All right. Let's proceed.

18 MR. HECHT: Your Honor, I would like to make it
19 very clear that if they want to go behind that, this wit-
20 ness has no personal knowledge, was not employed --

21 THE COURT: Let's get him.

22 L A U R E N C E L E S E, called as a witness
23 by the plaintiff, being first duly sworn, testified
24 as follows:
25

jh:mq

Lese-direct

50

THE COURT: Proceed.

DIRECT EXAMINATION

BY MR. HARRIS:

Q Where do you live, Mr. Lese?

A Silver Springs, Maryland.

My address is 16012 Chester Mill Terrace.

Q How old are you?

A 31.

Q What is your occupation?

A I am an attorney with the Securities and Exchange Commission, Division of Corporation Finance.

Q Have you ever had any contact with the defendant British American Commodity Options Corporation?

A Yes, I have.

Q When was the initial contact?

A Beginning of January of 1976.

Q And who made that contact?

A Gwenn Ramage.

Q What was the nature of that contact?

A Well, she initially called my home, received my wife, and she gave her my office number, and I was called at the office and I was asked if I was interested in purchasing options for commodity futures, I believe.

Q What did she tell you about options on commodity

futures?

MR. HECHT: Your Honor, I would like to state my objection with respect to the rest, that this is only admitted for a limited purpose and in all other respects I object.

THE COURT: It is only for limited purposes, yes.

A Well, she asked me if I was interested in purchasing the options and I told her I didn't know anything about them, and she asked me if I had \$1100 and with \$1100 invested in the options I could double or triple my investment, and - - she called me at the beginning of January, about the 12th or so, then she called me a week later, the 19th, and she said if I had purchased the options with \$100 the week before, I could have made \$500 in that one week alone.

Q Did she send you informational material?

A Yes. I advised her I had no knowledge of how the particular market operated, so she sent me some-- a little pamphlet.

MR. HARRIS: May I ask whether counsel will stipulate?

MR. HECHT: We will so stipulate.

Do you have the pamphlet there, too?

jh:mg

Lese-direct

(Plaintiff's Exhibit 6 received in evidence)

Q I show you Plaintiff's Exhibit 6 and ask whether you can identify that.

A Well, it is a copy, photocopy, of an envelope from British American Commodity Options Corporation addressed to my home, my former home. I moved about eight weeks ago. It was addressed, I believe it is January 13, 1976. The postmark is not entirely clear. The January and the 76 are quite clear, though.

Q Are there --

A And there is a second one, also addressed to my home. The postmark is over the stamp so I have difficulty making out the postmark.

Q Would you turn the page, please?

A OK. The third or the second copy is also a photostat of an envelope from British American addressed to me at my former home, dated March 15, 1976, from New York.

Q Did you have occasion to talk with anyone other than Gwenn Ramage?

A On March 18 I was called at home by a Mr. Bilotti.

Q What did you and Mr. Bilotti discuss?

A He tried to interest me in spending-- investing

\$3700 in options for sugar futures.

Q What did he tell you about that investment?

A He said with a \$3700 investment I could earn or I could make \$60,000.

Q Did you mention to Mr. Bilotti that you had been previously contacted by Miss Ramage?

A No, I did not. He apparently didn't - -

THE COURT: The answer is no.

Next question.

THE WITNESS: No.

Q Did you tell Mr. Bilotti what you did for a living?

A At the end of the conversation he asked me what I did.

I told him I was with the government and at the SEC and I was an attorney.

(Plaintiff's Exhibit 7 received in evidence)

Q I show you Plaintiff's Exhibit 7, which is a photocopy of an attached booklet, and ask whether you can identify that.

A Well, the booklet or the pamphlet and the photocopy, being the same thing, apparently, attempt to explain, well, London commodity options.

Q Is this one of the documents that you received

1 in one of the envelopes that was previously identified
2 as Plaintiff's Exhibit 6?

3
4 A I did receive a copy of the pamphlet, such as
5 this. Whether it is the exact same one, I don't know, but
6 I received this type of pamphlet.

7 MR. HECHT: Your Honor, I would like to object
8 at this stage. I really don't see the relevancy. We
9 have never denied that we are in business. We have never
10 denied that we operate the way we do. These documents
11 were all filed as part of the application, which I note
12 were not submitted.

13 I really don't see the relevancy of this on the
14 issue of whether or not British American is a commodity
15 trading advisor or how it goes to the public interest as
16 they have defined it in their complaint.

17 THE COURT: Are you conceding the first element
18 that we have here, that your activities do require you to
19 be registered?

20 MR. HECHT: No. What I am saying, our activities
21 involve giving trading advice, but if he is testifying on
22 what we charge for, he is not, and how we earn our income
23 and what we charge fees and make profits from, that's one
24 thing. He is testifying as to general sales and no one
25 disputes that the company is still in business and making

1 sales.

2
3 MR. HARRIS: May it please the Court, we refer
4 your attention --

5 THE COURT: You are introducing a booklet, is
6 that correct?

7 MR. HECHT: I have already stipulated to it.

8 MR. HARRIS: May it please the Court, I will
9 specifically refer your attention to Section 2(a)(1),
10 which defines the term "commodity trading advisor," and
11 that is someone who for compensation or profit engages
12 in the business of advising others either directly or
13 through publications or writings as to the value of com-
14 modities or as to the advisability of trading in any
15 commodity for future delivery on or subject to the rules
16 of any contract market or who for compensation or profit
17 and as part of a regular business issues or promulgates
18 analyses or reports concerning commodities, and it is our
19 contention, your Honor, that the activities of the defend-
20 ant bring it within the statutory purview of one who for
21 compensation or profit and as part of its regular business,
22 i.e., the business of selling London commodity options,
23 issues or promulgates analyses or reports concerning
24 commodities.

25 MR. HECHT: But Mr. Harris should also point

1 out at the same time, your Honor, that it continues on
2 to make it extremely clear that both the House and the
3 Senate took the position that where the giving of ad-
4 vice or analysis is merely incidental to its other busi-
5 ness, does not bring them under the definition of
6 commodity trading advisor.
7

8 THE COURT: All right.

9 MR. HECHT: And that is the critical element.

10 THE COURT: All right.

11 We will take this witness' testimony and then
12 we will find out what applies.

13 MR. HARRIS: May the reporter read back to me
14 the last question put to the witness.

15 (Record read)

16 Q Does the pamphlet discuss something entitled
17 "The Dynamics of Commodity Trading"?

18 A Yes, it does.

19 MR. HECHT: Your Honor, I would like to object.
20 The pamphlet speaks for itself.

21 THE COURT: It speaks for itself. All right.

22 MR. HARRIS: May we introduce this exhibit,
23 Mr. Hecht?

24 MR. HECHT: Yes, I have no objection, but I
25 think it would be fairer to the Court that you should

1 introduce copies of all the marketing literature utilized--

2 THE COURT: If you want to put anything in that
3 he doesn't put in, you may do so.

4 MR. HECHT: Thank you.

5 THE COURT: It is fundamental.

6 (Plaintiff's Exhibit 8 received in evidence)

7 Q Mr. Lese, I show you a document which has
8 been marked as Plaintiff's Exhibit 8, which is a photocopy
9 of another document that I am also showing you.

10 MR. HECHT: Is that the same one you introduced
11 as 7?

12 MR. HARRIS: No. This is another booklet. 7
13 is this one.

14 MR. HECHT: Do you have an extra copy of this
15 for me?

16 Q Is that one of the booklets that you received
17 in an envelope?

18 A Yes, I received this booklet.

19 Q And those booklets were received by way of
20 the United States mail, is that correct?

21 A Yes, they were mailed to my home.

22 MR. HARRIS: I have no further questions.

23 THE COURT: You may proceed, Mr. Hecht.
24
25

1 jh:mq

2 CROSS-EXAMINATION

3 BY MR. HECHT:

4 Q Mr. Lese, how long have you been employed at
5 the SEC?

6 A Six years.

7 Q Whose branch are you in, by the way?

8 A Used to be Mr. Koepf's.

9 Q I think you even have my old office, don't
10 you?

11 A Possibly. Now it is Mr. Robinson's branch.

12 Q You do know the difference between an invest-
13 ment advisor and a broker, don't you?

14 A No, I don't deal in that area. I really don't
15 know the difference.

16 Q You mean you don't know what an investment ad-
17 visor is?

18 A Not by definition.

19 Q You know what a broker is?

20 A Merrill Lynch is a broker.

21 Q In the course of your duties at the SEC do
22 you review registration statements?

23 A Yes, I do.

24 Q Have you ever reviewed a registration statement
25 of a mutual fund?

1
2 A No.

3 Q When Mrs. Ramage originally spoke to you
4 is it a fair statement to say that you didn't know any-
5 thing about commodity options?

6 A Yes.

7 Q And you so told her?

8 A Yes, I did.

9 Q And then she subsequently sent you some infor-
10 mation on commodity options?

11 A Yes.

12 Q And you reviewed that information?

13 A I took a look at it.

14 Q At any time during those conversations with
15 Mrs. Ramage did you tell her you were with the SEC?

16 A No. She never asked.

17 Q You thought it was kind of humorous that Com-
18 modity Options was calling you and you were with the SEC,
19 didn't you?

20 A I didn't think it was humorous at all.

21 Q You knew about this what, six months ago?

22 A Yes.

23 Q Do you now know anything about commodity options?

24 A Not a great deal.

25 Q You didn't buy anything from the company, did you?

1
2 A No.

3 Q Isn't it true that Mr. Bilotti said to you
4 that it is a speculative investment?

5 A A little bit speculative, I believe.

6 Q Did he explain to you that you could lose --

7 A His language was a "little bit speculative."

8 Q Did he explain to you that you could lose
9 your premium if the underlying commodity didn't rise in
10 value?

11 A Yes, but his emphasis was on how much money
12 I could make, \$60,000.

13 Q I just want to know what he said to you.

14 A In the context of that he said-- he down-played
15 how much money I could lose and he up-played how much
16 money I could earn, and it's in that context he talked
17 about risk, and it was very, very minimal.

18 Q Did he ever say he guaranteed you a profit on
19 anything?

20 A He never used the word "quarantee," but by his
21 language and by his talking he emphasized how much money
22 I could make, how the market was going up, how he be-
23 lieved Russia and China were holding back on sugar produc-
24 tion and on their exports, and all that leads to a higher
25 sugar price, and therefore my investment would get to be

\$60,000.

Q One other question.

What was the kind of option that Mrs. Ramage talked with you about when you originally spoke to her?

A I am not an expert and she talked to me options to buy commodity futures. I believe that's the terminology. I am not an expert in the field.

Q You are not an expert in the field?

A Certainly not.

MR. HECHT: I have no further questions.

THE COURT: Anything further?

MR. HARRIS: We have one thing further, your Honor. I would like this marked.

(Plaintiff's Exhibit 9 marked for identification)

MR. HECHT: Your Honor, we have had a problem in the past. Some of our salesmen have left and we found out subsequently that they had been using British American's letterhead and name and then putting their own number --

THE COURT: All right.

MR. HECHT: I want to check with Mr. Forma if in fact this document was ever used.

Your Honor, we will stipulate to its admission.

THE COURT: All right. Received in evidence.

(Plaintiff's Exhibit 9 received in evidence)

REDIRECT EXAMINATION

BY MR. HARRIS:

Q Mr. Lese, I show you what has been marked as Plaintiff's Exhibit 9, and ask you whether you can identify that.

A It is a letter with British American's letterhead, signed by Gwenn Ramage. It is like-- it is an investment letter, discussing --

MR. HECHT: Objection, your Honor.

It speaks for itself.

THE COURT: Yes, it does.

MR. HECHT: I think the Court is intelligent enough to read it.

THE COURT: Yes.

A Attached to it is a clipping from The New York Times. It is labeled at the bottom "New York Times," dated 12/30/75.

M R. HECHT: Your Honor, objection. We have already stipulated to the document and its admissibility.

THE COURT: Is this a letter that you received?

THE WITNESS: Yes, sir.

jh:mg

Lese-redirect

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MR. HARRIS: No further questions.

MR. HECHT: I have no further questions.

THE COURT: All right.

We will recess for lunch and resume at two
o'clock.

(Luncheon recess)

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AFTERNOON SESSION

2:30 P.M.

MR. HARRIS: The plaintiff calls Mr. Haas.

STEVEN CARLTON HAAS, a witness

called on behalf of the plaintiff, being first

duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q Would you please state your address, Mr. Haas.

A 520 East 72nd Street, Manhattan.

Q Will you please state your age.

A 38.

Q What is your occupation?

A I am a commodity options specialist.

Q Where do you work?

A For Bristol Options Inc.

Q Where are they located?

A At 101 Maiden Lane in Manhattan.

Q And how long have you worked for them?

A Since the 2nd of August.

Q Prior to that time where did you work?

A For British American Commodity Options Inc.

Q You mean the defendant in this case?

A That's correct.

2 slcg

Haas-direct

Q How long did you work for the defendant?

A Approximately 5 months, I believe. My employment started the 10th of March.

Q And terminated?

A August 2nd.

Q What were your duties when you were an employee of British American?

A I was a commodity options specialist, a salesman selling commodity options on the telephone.

Q I believe I used the word "employee" in my last question. It's my understanding that you were not an employee of British American.

A That is true. I am and was an independent contractor.

Q In the course of your duties with British American Commodity Options Corporation, what did you do exactly?

MR. HECHT: Your Honor, I would like to object except as it goes to the issue of whether or not they were a trading advisor in the public interest.

THE COURT: Yes, all right.

Q Let me put the question to you a different way, Mr. Haas --

THE COURT: What did you do there?

Isn't that the question?

MR. HARRIS: Yes.

Q What did you do there?

A I used the telephone to call up people and try to solicit business for my company and myself. I tried to interest them in commodity options as an investment vehicle.

Q What did you tell them?

A I told them that it was an opportunity to make a great deal of money; that they had the same high leverage as the futures marketplace but they did not have the commensurate risk factor.

Q Did you talk to them about the underlying commodities?

A Yes, I did.

Q What were the specific commodities about which you spoke?

A Coffee, copper, sugar, rubber, lead and zinc.

Q Approximately how many customers did you sell such options to?

A Nine.

Q Do you know what portion of the total compensation paid to British American represented its fee rather than the cost of the option itself?

A The underlying cost to the firm - is that your

4 slcg

Haas-direct

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question?

Q That's correct.

A I do not know specifically but I do have a general idea.

MR. HECHT: Your Honor, I would like to object. If he doesn't know, he doesn't know, and it is not an issue in this proceeding.

THE COURT: No, I will permit it.

A My understanding is that the markups are \$1500 or 55 percent, whichever is larger.

Q Of the total cost of the option to the customer?

A The total cost to the customer represents a markup from the company's cost of \$1500 or 55 percent, whichever is larger, but I do not know that to be true and factual.

Q And is your compensation predicated upon the markup or the total cost?

A The total cost to the customer.

Q Total cost to the customer?

A Yes.

Q Were you ever asked by any of your customers as to what the commission was?

A Yes, I was.

Q And how did you answer that question?

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A I normally told them that there were no additional commissions; that all operating expenses and commissions, all fees were included in the initial premium; it was a one-time cash outlay, and that that was their entire risk and exposure in the marketplace.

Q Were your customers all satisfied with that particular answer?

A To the best of my knowledge they were satisfied with it, yes.

Q Did any of them push you for any more detailed answer?

A No, none of my clients ever did. I may have had some prospects who pushed me a little tougher, but none of my actual clients ever were concerned.

Commodity
Futures

1 1 hr

Haas - direct

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2 Q Were you aware of the status of the defendant's
3 application for registration with the Commodity Futures
4 Trading Commission while you were there?

5 A I was aware that an application had been made.

6 Q How did you gain this awareness?

7 A There was a meeting sometime in April with Mr.
8 Hecht present, and at that meeting he mentioned that
9 application had been made and that British was awaiting a
10 decision from the Commodity Futures Trading Commission as
11 to what the disposition would be.

12 Q Were you ever told anything else with reference
13 to the application for registration as a commodity --

14 A Someplace along the line we were told or I was
15 told that there had been a delay, that the FTC was calling
16 for a hearing, but it was just a matter of a period of
17 time and that eventually the firm, British, anticipated that
18 they would be eventually registered and approved.

19 Q Do you know whether your present employer is
20 registered with the Commodity Futures Trading Commission?

21 A Yes, they are.

22 Q As a commodities trading adviser?

23 A Yes, as an adviser, yes, they are.

24 Q Are your duties with your present employer any
25 different than your duties were when you were with British

000118

American?

A Only to the extent that I have some supervisory capacities in addition to my sales.

Q The information that you are now giving to your customers, is it any different than the information you gave your customers when you worked for British American?

MR. HECHT: Your Honor, I

THE COURT: Sustained.

MR. HARRIS: I have no further questions of this witness.

THE COURT: Your understanding of the markup or percentage, what did you get out of the sale? You said you were an independent contractor.

THE WITNESS: I am compensated in gross at the rate of 10 per cent of the gross premium.

THE COURT: You receive 10 per cent of the gross premium?

THE WITNESS: That is correct.

THE COURT: And you received that from British American?

THE WITNESS: That is correct.

THE COURT: You say you are an independent contractor?

THE WITNESS: Yes, sir.

3 lhr

Haas - cross

THE COURT: In what respect?

THE WITNESS: That I am paid 1099 income and have to file quarterly taxes myself. The firm is not responsible for tax deductions, and things of that type.

THE COURT: They pay no Social Security for you?

THE WITNESS: No, sir.

THE COURT: And no other benefits of any kind?

THE WITNESS: None whatsoever.

THE COURT: Just 10 per cent?

THE WITNESS: They provide me with operating conditions, with literature and telephones and office space, and I get my compensation in gross, and any withholding or insurance or FICA, I have to take care of all that myself. My accountant does.

THE COURT: Proceed.

CROSS-EXAMINATION

BY MR. HECHT:

Q Mr. Haas, you just testified that your commission at British American was 10 percent, is that correct?

A That is correct.

Q Did you receive any other commissions for supervisory work?

A No, I didn't.

Q At Bristol isn't it a fact that your commission

4 lhr

Haas - cross

rate is 14 per cent?

A No, it is not.

Q What is your commission rate there?

A 11 per cent.

Q What is your override rate?

A One half of one per cent.

Q How many salesmen do you have working under you at Bristol?

A Twenty -- I would say roughly twenty. I can't give you an actual count.

Q What is your after-income per week at Bristol --

THE COURT: Is this relevant at all?

MR. HECHT: I want to show your Honor that there is a financial interest into that Mr. Haas --

THE COURT: What he is doing at the present I don't think has anything to do with what is involved in the case before us, and I really don't see any relevance whatsoever.

MR. HECHT: Can I respectfully suggest that it could show, if I ask about three more questions?

THE COURT: No, I don't believe so. I don't believe it has any relevance to the hearing before us now.

Q You testified before that the company's markup

1 5 lhr

Haas - cross

2 is 1,500 or 55 per cent.

3 A I said that is my understanding and believe.
4 I do not know it to be true.

5 Q Let the record reflect that I am handing to Mr.
6 Haas a copy of an exhibit filed before in this proceeding,
7 which is a summation of all completed transactions as at
8 British American as at April, 1976, and I am giving it to
9 the witness to look at.

10 [Pause.]

11 Q Have you finished looking at it?

12 A Yes, I have.

13 Q Do you understand what that is?

14 A Yes, I do.

15 MR. HECHT: If Mr. Harris has no objection,
16 I would like to admit this as our exhibit --

17 MR. HARRIS: I don't know what it is.

18 MR. HECHT: I will show it to you.

19 [Pause.]

20 MR. HARRIS: I object to this document insofar
21 as relevancy and materiality with reference to this
22 proceeding. I do not know for what purpose this document
23 is being introduced.

24 THE COURT: What is it?

25 MR. HECHT: A, it is public interest to show

6 lnsr

Haas - cross

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2 how our customers have done, which has already been
3 submitted, and, B, it goes directly to his testimony that
4 the markup was \$1,500. It really shows every completed
5 transaction by the company at the date of administrative
6 proceeding, which goes right to the public interest issue.

7 MR. HARRIS: There is nothing in this document
8 that goes to the question of markup --

9 MR. HECHT: There is, I think and I think it
10 will be very clear.

11 THE COURT: It may be better to have him des-
12 cribe it. It ought to be marked first of all, I suppose.

13 [Defendant's Exhibit D was marked for
14 identification.]

15 BY MR. HECHT:

16 Q Would you please describe for the Court what the
17 columns in that document are?

18 A You will have to clear up for me the final
19 column. I believe that that is what it was cashed in for?

20 Q Yes.

21 A It has a date of purchase, customer's account
22 number, the number of options involved, what type of an
23 option and commodity that it calls for, the month in which
24 it becomes due, the price, the premium paid -- I assume
25 that is the customer's premium -- and the final disposition

1 7 lhr

Haas - cross

2 in the marketplace.

3 Q You testified before that the company marked
4 up the premium either 1,500 or 55 per cent, whichever
5 was higher?

6 A That is correct.

7 Q Would you look down that premium column, and I
8 think you will see that the total premium charged to the
9 customers, and go through every one --

10 THE COURT: What is your familiarity with this
11 document?

12 THE WITNESS: I have no familiarity with this
13 document whasoever.

14 THE COURT: You know nothing about it at all?

15 MR. HECHT: How can they mark up a premium --

16 THE COURT: How can you ask him about a
17 document he has never seen before and doesn't know
18 anything about? I don't think this is proper.

19 MR. HECHT: We will bring in someone --

20 Q Isn't it a fact that if the company marks up the
21 premium 1,500, then the cost to the customer is 1,500
22 plus?

23 A I would assume so.

24 Q Isn't it a fact -- did you ever sell options
25 in lead?

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A Yes, I did.

Q Do you remember what the premium was to the customer?

A \$2,000.

Q When was that option sold?

A In fact, I never did sell one, but I was attempting to sell one in March of this year.

Q Isn't it a fact that many of the options offered by British American at gross premium were under \$1,000?

A Not to the best of my knowledge. After the first of April I don't believe I ever saw --

Q Before the 1st of April, many of them were less than \$1,000?

A I know of one.

Q Then how could the company mark it up \$1,500?

A Obviously that one couldn't have been marked up \$1,500.

Q As a matter of fact, isn't it true that the company's markup is not done that way, it is done on an average basis, and you know this, it has been told to you, you are free to inspect the books, it averages about 33 per cent?

A No, I don't know that.

Q It is a fact, is it, that the company doesn't just

9 lhr

Haas - cross

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arbitrarily mark up any option \$1,500?

A I do not know that to be true.

Q Do you recall being sued by British American?

A Yes, I do.

Q Do you recall the circumstances of the suit?

A That I changed employment, yes.

Q Do you recall that date was August 2nd? Is there anything that refreshes your recollection of what happened on August 2nd to trigger your leaving British American?

A Yes. There was an article in Barron's magazine referring to the present action possible fee is.

Q Would you say it was complimentary or derogatory to the company?

A I would say it was derogatory to the company.

Q Did you read a copy of that article?

A Yes, I did.

Q That's why you left the company, was it?

A That was a contributing factor. It was the final contributing factor, yes.

Q Isn't it true that you have an arrangement with Bristol that to the extent you can get any additional salesmen who formerly worked with British American, they would become part of your group?

A Absolutely not.

1 Q Where did these twenty salesmen come from that
2 are under you? How many of them came from British?

3 A Perhaps three, maybe four.

4 Q So in effect you have an aggregate additional two
5 person's income, if it is one half per cent sales on each
6 of those?

7 A I am sorry?

8 Q You get an override of one half of one per
9 cent?

10 A That's correct. But business must be done
11 first. If they aren't writing, I get nothing.

12 Q do you recall being subsequently sued by British
13 American?

14 A I most certainly do.

15 Q You are still angry at British American, aren't
16 you?

17 A No, I am not angry. I was a little disappointed
18 but I am not angry.

19 Q What was the nature of the suit?

20 A The nature of the suit was -- I am not sure that
21 I ever really knew what the nature of it was. It seemed
22 as though it was not very clear and it didn't make sense.
23 I think the nature of the suit was scare tactics to hold
24 remaining salesmen at British rather than to have them also
25

11 lhr

Haas - cross

000127

1 leave because of the Barron's article. That's what I believe
2 the nature of the suit was.

3 Q Wasn't it an injunctive suit to prevent you from
4 taking customer records and customer data of British
5 American?
6

7 A That among other things was included.

8 Q Did they also sue you for damages?

9 A Yes, they did.

10 Q Did that suit, to your knowledge, ever come
11 to a conclusion?

12 A It was settled, yes.

13 Q Did you consent to an injunction?

14 A No, not to the best of my knowledge.

15 Q In that injunction didn't you also sign a
16 stipulation of settlement and didn't that stipulation of
17 settlement say that you would do nothing to interfere with
18 the business of British American?

19 A No, it did not.

20 Q Is this your signature?

21 A Yes, it is.

22 Q Is that document familiar to you?

23 A Yes, it is.

24 Q Is that an original of the stipulation which
25 you entered into?

1 A It appears to be, yes.

2 Q In the case entitled British American Commodity
3 Options?
4

5 A Yes.

6 Q You also signed a consent with respect to an
7 injunction, do you recall that now?

8 A No, I do not.

9 Q That's the only piece of paper you recall
10 signing in this litigation?

11 A I recall seeing two pieces of paper, and I
12 do not know what the second one -- the second one I am sure
13 is right here. There is the second one.

14 Q That's a release?

15 A I didn't sign a consent to an injunction, to the
16 best of my knowledge.

17 MR. HECHT: I would like to move to admit this
18 as Defendant's Exhibit E.

19 MR. HARRIS: Is the purpose of the introduction
20 of this document to attempt to show an interest in the
21 witness --

22 MR. HECHT: To impeach his credibility. I
23 think it is a valid document for that purpose. He testified
24 to it. The document speaks for itself.

25 THE COURT: Any objection?

13 18.5

Haas - cross

000129

1
2 MR. HARRIS: I question the relevancy, but if
3 it is for the purpose of --

4 THE COURT: It is to show the interest of the
5 witness and possible bias.

6 MR. HECHT: Yes.

7 THE COURT: All right.

8 [Defendant's Exhibit E was received in
9 evidence.]

10 BY MR. HECHT:

11 Q Can you identify that document?

12 A It is the Commodities corner column in the
13 August 2nd edition of Barron's magazine on Page 29.

14 Q Is that the article you testified to before?

15 A That is correct.

16 MR. HECHT: I would like to move this, your
17 Honor, for admission as Exhibit F.

18 THE COURT: Is it really relevant?

19 MR. HECHT: I think it shows the destruction of
20 our business.

21 THE COURT: I don't think it is relevant to
22 the issue we have here.

23 Q Do you know who John O'Rourke is?

24 A Yes. He is one of the principals in the firm
25 that I work for.

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Q In fact, weren't you aware that in the second week of August people from Bristol were calling up salesmen at British American and telling them that unless they left British American they would all be indicted by the CFTC?

A I was not aware of that and am not now aware of that.

Q One other question: To your knowledge, isn't a fact that British American never charged for its advise? It charged on the difference between the purchase price and the sales price?

A I am not sure exactly what you are asking me.

Q How did British American derive its income?

A By soliciting people to purchase commodity options in the nature of an investment vehicle, to make money in specific commodities which were recommended by the company and by the independent contractors, and the profit on the premium between what British paid for it and what they sold it to the customer for, some percentage of that was the profit.

Q That's the net profit. Their revenues are from one source, is that right? The difference between what

1 15 lhr

Haas - cross/redirect

2 British purchased the option for and what the premium
3 was to the customer?

4 A Minus what they paid to the salesman for
5 soliciting the business, yes.

6 MR. HECHT: I have no further ns, your
7 Honor.

8 REDIRECT EXAMINATION

9 BY MR. HARRIS:

10 Q Mr. Haas, Mr. Hecht asked you about the article
11 appearing in the August 2nd issue of Barron's and you in-
12 dicated that that was a final contributing factor with
13 reference to your decision to leave.

14 A That is correct.

15 Q With reference to what we are here today for,
16 are there any other factors?

17 A No.

18 MR. HARRIS: That is all.

19 MR. HECHT: One further question I forgot on my
20 cross-examination.

21 REROSS-EXAMINATION

22 BY MR. HECHT:

23 Q You testified that there were some meetings
24 at British American where the administrative proceedings
25 were discussed?

16 lhr

Hass - recross

000132

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A Yes..

Q First, were you present at a meeting in March where we had a compliance lecture? Do you remember that?

A March or April. I thought it was April. I remember a meeting in April at which you were present.

Q Isn't it a fact that it was fully disclosed to the company what action the CFTC was taking against them?

A It was my understanding from what you said at that meeting that it was not a problem and that you anticipated being registered with the CFTC, that is you anticipated British American being able to gain registration with the FTC.

Q But as a salesman, weren't you instructed that the most important thing to do was to run your operations in a proper manner?

A Yes, I was.

Q Did we go over very carefully some of the potential problems and concerns of the CFTC?

A Yes, you did.

Q Didn't we also discuss the nature of the CFTC public hearing in March with respect to the proposed rules?

A I remember you saying that the CFTC was

17 lhr

Haas - recross

000133

going to have a hearing on British application. That is all I recall about a hearing.

MR. HECHT: I have no further questions.

THE COURT: Step down.

[Witness excused.]

MR. HARRIS: Plaintiff calls Seymour Cohen.

SEYMOUR COHEN, a witness called on behalf of the plaintiff, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q What is your address, Mr. Cohen?

A 415 East 52nd Street, Manhattan.

Q What is your age?

A 35.

Q What is your occupation?

A I am a commodity options salesman.

Q For whom do you work?

A Bristol Options, Inc.

Q How long have you worked for Bristol Options?

A Since August 2, 1976.

Q Prior to working for Bristol Options, for whom did you work?

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18 lhr

Cohen -direct

A British American.

Q How long did you work for British American?

A I started there on May 17, 1976.

Q What were your duties while you were working
at British American?

A I was a commodities options salesman.

Q What did you do as a commodity options salesman?

A I attempted to solicit sales of commodity options
via telephone, based upon names that were given to me by
my supervisor.

Q Where did you place these calls?

A Various parts of the country. All over the
United States.

Q Approximately how many commodity options did
you sell while you were employed at British American?

A 27.

Q To how many different customers?

A 23.

Q What were these commodity options in?

A All but one were coffee.

Q That one?

A Sugar.

Q In recommending these options to your customers,
what did you tell them?

19 lhr

Cohen -direct

000135

1 A I told them that there was a risk factor involved,
2 and that they had the opportunity to make good money in this
3 particular money, based upon the fact that they have
4 a premium that has to be recovered first before they can
5 make any money.
6

7 [Continued on next page.]
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P.M.

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1 slcg 25

Cohen-direct

MR. HECHT: Your Honor, I would like once again to state my objection to the limitations of his testimony --

THE COURT: Yes, received for a limited purpose.

BY MR. HARRIS:

Q In the course of working at British American, did you cause to be sent to your customers various pamphlets, brochures prepared by British American?

A Yes.

Q Did you cause to be sent to your customers copies of articles that appeared in the Wall Street Journal or the New York Times?

A Yes, sir.

(Plaintiff's Exhibit 10 for identification marked in evidence.)

Q I show you a document that is marked Plaintiff's Exhibit 10 and I will say that the original from which this was made had a blue strip across it.

Have you ever seen that document or one similar to it?

A Yes, I have.

Q Did you have occasion to send such a document to any of your customers?

A Not this one but one similar to it because this is dated prior to my coming to work there, but one very

1 similar dated the following month.

2
3 MR. HECHT: I am confused. What you gave me must
4 be different because you say he came in March.

5 THE WITNESS: May 17th.

6 MR. HECHT: Oh, May? Then my records are wrong.

7 Q Did the one that you sent also refer to the
8 various commodities that are mentioned in the document in
9 front of you?

10 A Yes, they did.

11 Q What were you told, and by whom were you told,
12 assuming that you were told, anything with reference to
13 British American's registration?

14 A I was never told anything by anyone --

15 MR. HECHT: Your Honor, I object to the form of
16 the question. I think he is leading the witness and there
17 are three assumptions in there.

18 THE COURT: I will permit it.

19 You weren't told anything?

20 THE WITNESS: I wasn't told anything by anyone
21 in authority at British American. Of course, there was
22 scuttlebutt at all times about the pending hearings, and
23 so forth.

24 Q When you say scuttlebutt, from whom did you hear?

25 A Different salesmen.

3 slcg 27

Cohen-direct

000138

Q You mean these were rumors?

A Well, this all happened before I came to work there, but I was filled in by other salesmen as to what happened. Whenever I would question my supervisor about this or on anything, whether it be this or anything else, I would never get an answer.

Q Whenever you questioned your supervisor?

A That is correct.

Q Who was your supervisor?

A Mr. Paul Mathis.

MR. HECHT: Your Honor, I just don't understand the relevance of this whole inquiry about who his supervisor is.

THE COURT: I don't understand it either.

MR. HARRIS: I would pass that.

I have no further questions of this witness.

THE COURT: All right.

MR. HECHT: Your Honor, has that been marked in evidence, that item?

THE COURT: It has been marked in evidence, as Exhibit 10.

MR. HECHT: Your Honor, since this is a non-jury trial, and since this witness has already testified that he had no direct knowledge and it was done before him, techni-

1 cally he is not a proper basis to admit it. However, I
2 think it is relevant to the --

3 THE COURT: He has indicated that something
4 similar to this was mailed out while he was there; that is
5 as I understand it, even though this is dated April --

6 Isn't that what you told us?

7 THE WITNESS: That is correct.

8 They were updated every month.

9 MR. HECHT: Very well, we will raise no objection,
10 your Honor.

11 THE COURT: He turned to me when you weren't
12 listening and said that they were updated every month.

13 CROSS-EXAMINATION

14 BY MR. HECHT:

15 Q Mr. Cohen, if I understand your testimony
16 correctly, your customers who you obtain for the company
17 purchased a total of 27 options?

18 A That is correct.

19 Q Of which 26 were coffee?

20 A That is correct.

21 Q And one was another?

22 A Yes.

23 Q How did your customers do? Did they all make
24 money?
25

5 slcg 29

Cohen-cross

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2 A It's hard to say because none of them executed
3 their option at this point.

4 Q What is the present price of coffee now?

5 A It's about \$1.38.

6 Q And what was the price of coffee during the
7 period you worked for the company? What was the range?

8 A It ranged from \$1.12 to \$1.31, and then back
9 to 89 cents, and back up to \$1.38.

10 Q What was the range that your customers purchased
11 at options in?

12 A Anywhere from 95 cents to \$1.31.

13 Q And it is now \$1.38?

14 A That is correct.

15 Q Were you aware of how British American derives
16 its gross income?

17 A Yes, I am.

18 Q Will you state for the court what your recollec-
19 tion is?

20 A It is my understanding that they purchased the
21 options from Shearson, Hayden, Stone, and then after
22 paying commissions to their sales people, the balance is
23 theirs to do as they please.

24 Q You mean they get a premium from the customer?

25 A That is correct.

6 slcg 30

Cohen-cross/Jones-direct

000141

Q Is that the only charge to the customer?

A To my knowledge.

Q And what their gross income is, is what they charge the customer less what they pay the salesmen and their operating expenses?

A That is correct.

Q Have you ever known British American to ever charge a customer for investment advice or trading advice or analysis work?

A No.

MR. HECHT: I have no further questions.

THE COURT: Anything further?

MR. HARRIS: No.

(Witness excused.)

THE COURT: All right, next witness.

MR. HARRIS: The plaintiff calls Nicholas Jones.

N I C H O L A S J O N E S, called as a witness

on behalf of the plaintiff, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q Where do you live?

A 415 Central Park West, New York City.

Q How old are you?

1 7 slcg 31 Jones-direct

2 A 40.

3 Q Where do you work?

4 A Bristol Options.

5 Q How long have you worked for Bristol Options?

6 A Since August 2nd.

7 Q Where did you work prior to August 2nd?

8 A British American Commodity Options Corporation.

9 Q How long did you work there?

10 A Approximately five months.

11 Q During the five month period did you sell any
12 commodity options?

13 A Yes, I did.

14 Q Approximately how many did you sell?

15 A Approximately 45; 45 or 50.

16 Q To how many different customers?

17 A Approximately 30 clients.

18 Q What were these commodity options in?

19 A Coffee, lead, sugar and zinc.

20 Q What did you tell your customers with reference
21 to coffee, lead, sugar and zinc?

22 A I explained to them that there was a risk involved,
23 but the anticipation was in the field that coffee would be
24 going up in price because of the conditions in Brazil and
25 the coffee producing countries; that their crop was lower,

1 8 slcg 32 Jones-direct

2 especially in Brazil because of the frost which had destroyed
3 about 75 percent of their coffee last year.

4 MR. HECHT: Your Honor, at this stage I would
5 like to submit my objection again --

6 THE COURT: Same ruling.

7 A (Continuing) And in the case of lead and zinc,
8 the metals, that the demand for these metals would be
9 going up based on the fact that they were tied to the
10 automobile industry.

11 Q When you discussed these commodities with your
12 customers did you talk about the price of the underlying
13 commodity?

14 A Yes.

15 Q I take it that the options that you sold to your
16 customers were call options, is that correct?

17 A Yes, they were call.

18 Q Did you sell any put options for your customers?

19 A No, I didn't.

20 Q In communicating with your customers how did you
21 speak with them?

22 A I would call them and I would give them the
23 basic fundamentals of commodity options. I would tell them
24 that an option gives you the right to buy or sell a basic
25 commodity at a specified price for a specified period of

9 slcg 33

Jones-direct /cross

time, and that there were risks involved; but however, there were some safeguards which you didn't find in the regular futures market, and one would be that there were no margin calls and there was no fear of forced liquidations in the market.

Q Did you have occasion to mail to any of your customers brochures, pamphlets?

A Yes.

MR. HARRIS: No further questions.

CROSS-EXAMINATION

BY MR. HECHT:

Q Nick, you testified before that you sold about 45 options while you were employed at British American?

A Approximately.

Q Could you recall about how many were in coffee, how many were in lead, how many were in sugar and how many were in zinc?

A I actually don't remember the exact number but the major percentage of them were in coffee.

Q How did your customers do?

THE COURT: Really, does it make a bit of difference as far as we are concerned how they made out?

MR. HECHT: Yes --

THE COURT: The question is whether they were a

1 10 slcg 34

Jones-cross

2 commodity trading advisor subject to the Act, and whether
3 these peo would have lost money, it doesn't make a bit
4 of difference as far as I can see in what we are involved
5 here.

6 MR. HECHT: I think it does, your Honor, on
7 two grounds: As to the public interest, this is not a
8 situation where the customers or the investment community
9 is being hurt --

10 THE COURT: That is just fortuitous in connec-
11 tion with any dealing in any kind of Exchange, you know
12 that, and I don't think it's relevant to the issues that
13 we have before us.

14 MR. HECHT: Your Honor, I disagree. I think it
15 is relevant--

16 THE COURT: All right, I am in charge here, so
17 that's it.

18 BY MR. HECHT:

19 Q Nick, you heard Mr. Haas testify before, didn't
20 you?

21 A Yes, I did.

22 Q Were you at those meetings he referred to?

23 A Yes.

24 Q You know who I am, don't you?

25 A I know you're Charles Hecht, an attorney.

1 11 slcg 35 Jones-cross 000146
2 Q And you have had an opportunity to talk to me
3 when I have been down at British American?

4 A Yes, I have.

5 Q And have you always felt free to ask any questions
6 about the status of this proceeding with me?

7 A If I would have chose to, yes.

8 Q I think you did once, didn't you?

9 A Yes, I did.

10 Q And did I answer your questions?

11 A You told me that the application had been filed,
12 and I think the application had been rejected and the
13 application would be resubmitted.

14 Q And then we spoke again because you wanted to
15 know what the status was of the administrative proceeding,
16 do you remember that? We spoke in a little coffee shop
17 around the corner when I was having lunch there?

18 A I think I asked you what was the latest informa-
19 tion on it.

20 Q And did you receive it?

21 A At that time I think you told me that it was
22 being re-filed, that's all I remember.

23 Q When did you come with the company, again?

24 A I came with the company in the first part --
25 the last week in February.

12 slcg

36

Jones-cross

000147

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2 Q To your knowledge did British American ever
3 charge for its advice or opinions on commodities as a
4 separate charge?

5 A Not to my knowledge, no.

6 Q Well, in the course of being a commodity option
7 specialist, don't you, as such a person, have an opinion
8 with respect to commodities?

9 A Yes.

10 Q And you wouldn't sell anything to anyone unless
11 you believed in it, isn't that right?

12 A I sold on the information we had gotten from the
13 research department.

14 Q Did you form your own opinions too?

15 A A personal belief after following some of the
16 research material.

17 Q But you had your own opinions with respect to
18 whether one option was a better investment at that time
19 vis-a-vis another option, didn't you?

20 A Yes, after analyzing the research material.
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1 1 lhr

Jones - cross

000148

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2 THE COURT: Individually you didn't know anything
3 about coffee?

4 THE WITNESS: Prior to coming to the market.

5 THE COURT: Prior to coming to the market. You
6 accepted the information that you received in these
7 letters, and so forth, the research department?

8 THE WITNESS: Research department, and what I
9 read in the newspapers and speaking to other people.

10 Q You mean you did some of your own research too?

11 A As far as reading different publications, yes,
12 that weren't accessible to anyone.

13 Q Do you feel that you have always dealt fairly with
14 customers, both while you were at British and now that
15 you are at Bristol?

16 A Yes.

17 Q When did you leave British American?

18 THE COURT: August 2nd.

19 A August 2nd.

20 Q Did you also read that article?

21 A Yes, I did.

22 Q Was that the principal reason you left?

23 A That was one of the reasons.

24 MR. HECHT: I have no further questions.

25 MR. HARRIS: No further questions.

THE COURT: All right.

[Witness excused.]

MR. HARRIS: My last witness now, your Honor, the plaintiff calls Daniel Turbeville.

THE COURT: Are you getting into a new field now?

MR. HARRIS: It is cumulative. I want to get one more document identified, and that will be it.

DANIEL TURBEVILLE, called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q What is your address?

A I live at 208 West 23rd Street in Manhattan.

Q Where do you work?

A I work for Bristol Options, Inc., 101 Maiden Lane in Manhattan.

Q How long have you worked for Bristol Options?

A Since August 2nd of this year.

Q Where did you work prior to August 2nd of this year?

A Prior to this I worked for British American Commodity Options.

Q How long did you work for British American

3 lhr

Turbeville - direct

000150

Commodity Options?

A Approximately from the end of April until August 2nd.

Q Of this year?

A Of this year.

Q Approximately how many options did you sell?

A Approximately 18 options, 15 clients.

Q Where were your clients situated? Where were they located?

A They were situated throughout the United States of America, anywhere from Philadelphia, Pennsylvania, to Alaska, in that whole vicinity.

Q Did you communicate with them by telephone?

A Certainly did.

Q Did you have occasion to send them things in the mail?

A Certainly did.

[Plaintiff's Exhibit 11 was received in evidence.]

Q I show you a document marked Plaintiff's Exhibit 11 for identification and ask whether you have ever seen that document before?

A This document I believe -- I believe there were some copies of this document in the office. I personally

1 never had occasion to send this out due to the fact that
2 I was not with the firm until the same afternoon this
3 document was relevant to the coffee market, and I used up-
4 dated material.
5

6 Q Now, do you know whether or not that particular
7 document was ever sent out? From your own knowledge.

8 A From my own knowledge, no. I can only suppose.

9 MR. HARRIS: I have no further questions.

10 MR. HECHT: Your Honor, is that in evidence?
11 We don't believe that document was ever sent out. He
12 didn't identify it. He said he had no knowledge of it
13 until it was sent out.

14 THE COURT: What's the number on it?

15 THE WITNESS: 11.

16 MR. HECHT: I would like to object to its
17 admissibility, your Honor.

18 MR. HARRIS: Mr. Turbeville indicated that there
19 were other documents similar to that that were sent out.

20 THE COURT: Was it the same content except for
21 the date?

22 THE WITNESS: Yes, sir, in that it concerned
23 a particular commodity, in this case it is coffee, in
24 that it concerned areas in the world where this coffee is
25 grown. In that, there was similarity.

5 lhr

Turbeville - direct/cross 000152

THE COURT: We will receive it, with that understanding, that it is not -- that something similar to that was sent out.

THE WITNESS: In those instances.

[Plaintiff's Exhibit No. 11 was received in evidence.]

CROSS-EXAMINATION

BY MR. HECHT:

Q How long did you work at British American?

A From the end of April until August 2nd of this year.

Q During that period were you fully familiar with the operations?

A No, sir, I wasn't.

Q Did you understand how the company operated?

A I understood more and more as time went on.

Q Did you understand how the company derived its gross income?

A To the extent it has been stated in court, yes, without any specific figures.

Q Do you know of any other source of income of the company other than its premium income that it receives from its customers?

A No, sir.

MR. HECHT: I have no further questions.

THE COURT: Anything further?

MR. HARRIS: Nothing further, your Honor.

THE COURT: You may step down.

[Witness excused.]

MR. HARRIS: Plaintiff rests.

MR. HECHT: Your Honor, at this time the defendant would like to move for a directed verdict on two grounds. One, under the statute, and I prepared a short memorandum of law, it is clear that Congress specifically excluded the type of activity set forth here in the trial from the definition of commodities trading adviser. I will quote. It comes from Senate Committee Report No. 93-1131, 1974, Page 24:

"The Committee approved without change the provisions of the House bill for the regulation of commodity trading advisers and commodity pool operators. However, the Committee wished to make clear that many individuals who are engaged in the buying and selling of commodities may, in the course of their arms' length transactions with customers, offer opinions on the value of commodities or commodities futures which are entirely gratuitous. Any such incidental expression of views does not bring either an employee or his employer within the definition of

7 lhr

000154

commodity trading adviser."

In accord also is the Federal Securities laws which recognize that people can deal in securities, they furnish advice, but they are not investment advisers, unless there is a specific charge for that advice. There is a basic distinction that has been realized in the Federal Securities laws, it is realized in the formation of the statute which is patterned directly after Section 2202A of the Investment Advisers Act of 1940. There are opinions on it by the Attorney General which are cited in here and they also appear in CCH, which clearly show that there is an essential distinction between compensation for advice itself and compensation for service of another character to which the advice is a necessary incidental. Otherwise, every person who ever recommended a security, whether it be a broker or a lawyer or a doctor, would have to register as an investment adviser under the Investment Advisers Act of 1940.

There is an even more basic reason, your Honor, why this case has to be dismissed. The plaintiffs have not submitted one iota of evidence of why it would be in the public interest to put British American out of business pending the administrative hearing. There is absolutely no evidence.

1 8 lhr

2 Leading up to this hearing British American put
3 in documentary evidence of how its customers had done. We
4 buy the options for our customers, this is not a J. S. Love
5 situation or a Goldstein - Samuels situation. Our customers
6 have been treated fairly. Most have made money, some have
7 lost money. Yes, to a degree it is fortuitous whether or not
8 someone makes money. All we can do is give them an honest
9 opportunity.

10 What would happen to the customers of British
11 American if they were enjoined? British American, as the
12 testimony of the four former employees shows, only charges
13 when the person buys the option, if they want to close out
14 the option, there is no charge to the customer. What do
15 these customers do? What happens in the marketplace if
16 these two thousand customers have no place to exercise
17 their option? They won't know where to go, they won't
18 know who to go to. It boils down to where was the CFTC
19 all of this time?

20 They inspected us, as you know from the papers
21 in court which they don't dispute, they were there, they
22 accepted our application for filing. Yes, they brought a
23 proceeding on whether or not we should be registered.

24 If any client was running its business improperly,
25 your Honor, they wouldn't be treating their customers fairly.

9 lhr

There was not one bit of testimony from the four former employees, each of whom obviously didn't have good feelings, because they all signed this consent that is admitted into evidence -- the point is they dealt honestly with the people, they do provided a meaningful service, and there is nothing really to be accomplished by an injunction here.

THE COURT: I have got two questions or two areas to discuss with you. One is this. Certainly on the basis of the testimony that's been adduced so far I might conclude that you are a commodity trading adviser subject to the Act. There is such evidence in the record on which I could make that finding. I am not making it now, but there is sufficient evidence in the record.

The second problem that I have is the fact that you are not registered and you are continuing to deal in options, which if I should find that you are subject to the Act as a commodity trading adviser, you are continuing to operate even though you are not registered to do so.

Those are the two areas that I should discuss. I don't think there is any need to discuss the first one as to whether or not there is sufficient evidence in the record. That is a question that I will determine on the basis of --

MR. HECHT: Can I submit my motion on that

1 10 lhr

2 point and a short memorandum of law which discusses commo-
3 dity trading advisers? I have a copy for my opposing counsel.

4 THE COURT: Sure. The second point I ask you
5 to address yourself to, prior to the thirty days, appro-
6 priate action was taken or action was taken by the Commodity
7 Futures Trading Commission, and accordingly you are not
8 registered. You presumably are continuing to operate
9 while unregistered.

10 MR. HECHT: Your Honor, I can handle that in
11 two aspects.

12 One, of course, we can put on our case, which is
13 in accordance with the evidence submitted heretofore,
14 but this is a new agency. As you said yourself in con-
15 nection with another matter, it is a new agency and there
16 are always problems with a new agency in getting things
17 straightened out. This is not a situation where if I was
18 a broker - dealer and wanted to open on Wall Street tomorrow,
19 I could open up without being registered with the SEC.
20 What you have here is a situation which is not controverted
21 by the CFTC, that once they advised us that they desired to
22 take jurisdiction, that is in February of 1976, we met with
23 them in March, we promptly filed on March 17th. I think
24 it could be pointed out very easily, I don't think the
25 CFTC will much dispute, that we were one of the first of the

11 lhr

1 so-called option dealers to file as a commodity trading
2 adviser, and that there are maybe 80 or 100 option dealers
3 out there that have never even attempted to file.
4

5 The second thing is that what you are saying
6 here is that an administrative agency, for whatever reasons
7 someone who works for that agency, an employee, deems
8 appropriate, can drag out an administrative proceeding. If
9 you enjoin my client --

10 THE COURT: The question of dragging it out is
11 something that is unfortunately not specifically spelled
12 out in the Act as it is in the SEC. You may reach the
13 period of due process, unless there is a fairly prompt
14 determination in an administrative hearing. The question
15 of whether or not we have reached that stage of it now is
16 something that I am not going to say --

17 MR. HECHT: We are going down there I think
18 Friday.

19 THE COURT: -- at this moment, but we may reach
20 a due process argument on that if they protracted -- or at
21 at least if the CFTC by itself delayed those hearings,
22 I don't feel it is my province in any way to order an
23 administrative officer to order a determination or a hearing.
24 That is simply not my function, nor will I do it. You are
25 right, that in connection with the writing of this

1
2 legislation, if as applied the delay is so long, you may
3 run into a due process situation, and the question is whether
4 or not we have reached that point at this stage.

5 MR. HECHT: Your Honor, let's not even get to the
6 due process. Let's look at the practical situation. Let's
7 say the company were enjoined for one week while this
8 administrative process was going on. What do they do with
9 their salesmen? What do they do with their back office?
10 Bristol will be on the phone calling the salesmen up and
11 saying, "Come on over." What do you do with a salesman,
12 what do you do with a back office? This is not a fraud
13 situation. The public here --

14 THE COURT: Don't you take that risk when you
15 first set up your organization and start to trade before
16 you have been approved or your application has been
17 approved? You have that thirty-day period within which
18 they have got to act. If they don't act, then you are
19 registered. They did act here and that is conceded on the
20 record.

21 MR. HECHT: Yes. They filed an -- the point is,
22 they did act to put us out of business. They said, "Look,
23 you are entitled to a public hearing." You and I have
24 our disagreements as to exactly how that statute is to be
25 read.

1
2 No one disagrees that that notice was a notice
3 of public hearing, to hold a public hearing on whether or
4 not British American was fit to be registered. We are in
5 an evidentiary hearing. You and I have seen, there have
6 been massive securities frauds, we have seen where the
7 public is being hurt. I don't know of one case and the
8 CFTC has not cited one case where -- there is absolutely
9 no evidence of fraud, absolutely no evidence of wrong-
10 doing -- that someone is put out of business.

11 If we hadn't filed an application in good faith,
12 yes, then I could understand the argument. But we have.
13 They asked us. We did. It was pointed out on the record,
14 and if you don't grant our motion, it is pointed out in
15 the record that our client acted on the advice of counsel,
16 which was consistent with the advice of the CFTC, which we
17 permitted to come in and inspect.

18 When the CFTC finally made up its mind, Mr.
19 Gusraw and I had a disagreement, his opinion was that the
20 jurisdiction wasn't there, mine was yes. Technically
21 you are right under the statute. They want us as a com-
22 modity trading adviser. But we obviously don't come within
23 that area.

24 The point is, what this company has done is more
25 or less, in the public interest, said, "Look, we don't know

1 14 lhr

2 whether or not we come within the definition, but we will
3 register under that category if the staff so wants us."

4 All we did is we followed their instructions.

5 THE COURT: If you had failed to file --

6 MR. HECHT: Then I could see an injunction.

7 THE COURT: Then they came in with an injunction
8 proceeding, we would have the same proof we had here.

9 MR. HECHT: I think it would be a little
10 different, because if you go through every case they cited,
11 in the SEC case, you bring an injunction to force someone
12 to register.

13 THE COURT: The statute specifically gives them
14 the authority to go to a District Court to seek an
15 injunction. That's provided in the statute.

16 MR. HECHT: So does it give the SEC in its
17 statute. There is a difference. Their injunction in
18 that case would be to force us to register. What we have
19 done by registering, that's what I thought and how I read
20 the law, you avoided the necessity of an injunction, except
21 for fraud.

22 The CFTC public announcements are on that,
23 because after we filed there was a big push to register
24 option dealers as CTA's, after we filed. They announced
25 in May, which was seven weeks after we filed, that the onl

1
2 way they could really get someone was for fraud, even if they
3 didn't register, because the Act was very unclear.

4 What this particular company did is it basically
5 said to the CRTC, "Look that statute was signed for the
6 proper regulations of operations. Yes, there is a mistake
7 in the statute. We don't fit in any of the pigeon holes.
8 But, yes, we will consent to your request that we register,"
9 and we registered. This is not someone who is seeking
10 to avoid its obligations, your Honor. This is someone
11 who has gone above and beyond what is required and done
12 its obligations to register, and it filed and it is conceded.

13 You have a very practical problem. What happens
14 to these 1,500 to 2,000 customers who have outstanding
15 options? That's the public interest, isn't it, really?

16 THE COURT: I think the test -- I know the
17 test in these administrative hearings with respect to this
18 is not the same as it is in the commonlaw field.

19 MR. HECHT: That's one of the reasons, your
20 Honor --

21 THE COURT: This is Judge Kaufman's decision in
22 the Dynamics case.

23 MR. HECHT: Which Mr. Gusrae participated in.
24 That's one of the reasons we said in our papers originally
25 that the term "in the public interest" should initially

be made by the administrative agency.

However, under the equity considerations, the plaintiff here has not introduced one scintilla of evidence or fact showing why it would be in the public interest to put my client out of business.

THE COURT: Let me hear from Mr. Harris.

MR. HARRIS: You want to hear from me at this time, your Honor?

THE COURT: Yes, I do.

MR. HARRIS: I don't think that it is incumbent upon the CFTC to allege fraud or to make any showing with reference to fraud, and insofar as the concern for their customers, it seems patently obvious to me that if the defendant is really concerned about its customers and if it has to go out of business, it can turn the mechanics of these options over to Shearson-Haydon-Stone, the party through whom the options were purchase. The plain fact of the matter is, as I argued before you sometime ago, they are not registered. They are doing business as a commodity trading adviser.

While Mr. Hecht talks about deficiencies in the statute, the plain fact of the matter is that they are giving advice with referennce to commodities, and in the process of selling the London commodity options they are

making compensation or they are obtaining compensation, they are making a profit, and it is part of their regular business buying ~~the sale of~~ ^{and selling} London commodity options, they issue or it issues and promulgates analyses or reports concerning commodities, which analyses and reports are distributed to the public by means of the mail.

Section 2(a)(1) goes on after it defines who commodity trading advisers are, and it excludes certain groups of people. It excludes banks and trust companies, it excludes newspaper reporters, newspaper columnists, editors, lawyers, accountants or teachers. It excludes any floor broker or futures commission merchant. It excludes the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation, including the employees. It excludes any contract market and it excludes such other persons not within the intent of this definition as the Commission may specify by Rule --

THE COURT: Let me suggest this, Mr. Harris. I don't have too much difficulty with the first half of the problem. At least I don't need any further elaboration on that.

What about the question of the injunction?
Let's assume for your argument, for our purposes here, and

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1
2 for what I want to hear, and for what I want to hear from
3 you about, that they are a commodity trading adviser, assume
4 I should so find. Where do I go from there?

5 MR. HARRIS: If you so find that they are a
6 commodity trading adviser, then we feel it is incumbent
7 upon the Court to order that they do not engage in the
8 business of being a commodity trading adviser until such
9 time as they are registered. This is consistent with the
10 CFTC office of general counsel interpretative release, of
11 which Mr. Hecht is aware and to which he has not made
12 reference, and which I called to the Court's attention,
13 because we have reaffirmed our view that until final
14 regulations are put into effect, the commodity trading
15 adviser provisions of the Act are those provisions that are
16 applicable to those people that are selling London
17 commodity options.

18 That is the long and short of it. We felt it was
19 a very simple case that we were bringing before you. We
20 are talking about a violation of Section 4(m). We have
21 shown that more than 15 people will have purchased these
22 commodity options, we have shown that advice has been
23 rendered with reference to the commodity options, and while
24 it might be unfortunate for these people in the back office
25 and the salesmen, this is a creature that was created by

1 19 1hr

2 British American. It wasn't created by the CFTC. They
3 are the ones that are responsible for the chaos that would
4 ensue, positing that there would be chaos, and I am not
5 at all certain that there would be chaos.

6 The Act speaks very clearly for him. It says it
7 shall be unlawful --

8 THE COURT: You say there is nothing that --
9 ipso facto, by being a commodity trading adviser, I have
10 the power, if they are so found to be, to restrain them
11 from conducting any further operations until their registra-
12 tion application has been acted upon?

13 MR. HARRIS: I don't think it is a question of
14 power. I think it is a question of the mandate that's been
15 given under 4(m).

16 THE COURT: That's ipso facto?

17 MR. HARRIS: Yes.

18 THE COURT: How long can you go on without
19 ruling upon their application? Suppose you took six
20 months, eight months, ten months, a year, and all of that
21 period of time nothing has been done or no decision has been
22 rendered.

23 MR. HARRIS: I think if the Court glances at the
24 large folder of materials provided by defendant's counsel
25 to the Court with reference to the administrative proceeding,

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20 lhr

I think the Court will immediately perceive that any delay that has ensued in the administrative proceeding has not been a delay occasioned by any action taken by this Commission, other than the fact that this Commission asked the administrative law judge to postpone the pre-hearing conference for four days so that it wouldn't have fallen on Yom Kippur, in deference to Jewish lawyers. That is the extent of the delay involved that has been initiated by the Commission. It was Mr. Hecht who has raised the various questions that took time to decide.

So I can't give you any answer on time. Obviously it ill behooves the defendant, who really comes in and says, "Look at the delay," but it is the delay that has been occasioned by actions taken by this defendant. ~~Nothing~~ ^{Nothing} ~~knowing~~ that has been done by the division of enforcement has resulted in this delay. So I cannot give the Court an answer as to time. I can state this for the division of enforcement, that we would do nothing to impede the prompt resolution of the problem which we are anxious to have resolved as quickly as possible. We have done nothing to this date that would indicate otherwise.

THE COURT: Any response, Mr. Hecht?

MR. HECHT: Yes. Two responses, your Honor. I think that Mr. Harris sees the law differently than I do

21 1hr

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1 in the Second Circuit, that an agency, especially in two
2 recent cases, one under the Commodities Act, the J. S.
3 Love case, and the other is a very important case before
4 Judge Ward, the Bausch and Lomb case, which came down about
5 ten days ago, sets up specific criteria for an agency to
6 obtain an injunction.

7
8 THE COURT: J. S. Love, they had been registered,
9 hadn't they?

10 MR. HECHT: No. I am not so sure. That was
11 a fraud case. That was a fraud case, your Honor. This is
12 not a fraud case. J. S. Love I don't believe was registered,
13 and the only thing is, I think it is important, J. S.
14 Love, there was apparently a problem as to naked options,
15 and there was apparently a problem that J. S. Love in effect
16 took \$8,000,000 out of J. S. Love and used it for his
17 Montessorri schools. It is covered in some of the supporting
18 papers. The important thing in J. S. Love, with respect
19 to the one case that was litigated, that was with respect
20 to Mr. Winters, even though a violation was found, the Court
21 held that it was not in the public interest to enjoin the
22 defendant.

23 THE COURT: Mr. Harris, I have gone through it
24 before, several times, I have just gone through it again,
25 it is hard to tell whether --

MR. HARRIS: I was not involved in the J. S. Love case, your Honor.

THE COURT: That ought to be ascertained without any difficulty, as to whether or not they filed an application or were registered or not.

MR. HARRIS: I could ascertain that and let you know.

MR. HECHT: I don't believe they did.

THE COURT: I reread the case again and read it with --

MR. HARRIS: A microscope.

THE COURT: Yes, I could find out whether or not it is contained in here. I just can't locate it at the moment or whether the Court discussed it.

MR. HECHT: Your Honor, I believe that they were not registered, and it shows in the consents of four of the other parties that were filed downstairs. They signed consent degrees wherein they agreed to file, to register. Take a look at the consent decree. We can go down and get them.

THE COURT: There is one way to find out. You will know, your records will indicate, and why should we speculate about it. It may have come out before and maybe it wasn't an issue that was raised that Judge Bonsal had

23 1H

1 to pass upon. That may be different from what we have here.
2 I just don't know at this stage of the --

3 MR. HECHT: Your Honor, I reviewed the case.
4 I don't think the Court ruled on that issue because it
5 was consented to by the defendant.
6

7 THE COURT: But, there may be a question as to
8 whether or not they were registered. If they were
9 registered, that's one thing. If they were not registered,
10 that's another thing.

11 MR. HECHT: I think in the complaint I have it.
12 I have the J. S. Love complaint with me, and that may solve
13 it, because I think there is an allegation that they were
14 not registered.

15 THE COURT: There may be an allegation in there.
16 If there is an allegation to the effect that they were not
17 registered and it is admitted --

18 MR. HECHT: There is an allegation that they
19 were not registered. I have it right here in my papers
20 and I think I can find it quickly.

21 THE COURT: All right. Why don't we take a
22 short recess. You have nothing further?

23 MR. HARRIS: I have nothing further.

24 THE COURT: How long will your case take?

25 MR. HECHT: I'd say, exclusive of cross-

24 lhr

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examination approximately three hours, at the most.

THE COURT: Let's take a short recess. Maybe
you can ascertain that in the meantime.

[Recess.]

[Discussion off the record.]

[Adjourned to Thursday, October 7, 1976,
at 10:00 a.m.]

- - -

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

-against-

BRITISH AMERICAN COMMODITY
OPTIONS CORP.,

Defendant.

76 Civ. 3247

OPINION

A P P E A R A N C E S :

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Of Counsel

GAGLIARDI, D. J.

Plaintiff Commodity Futures Trading Commission ("CFTC") moves by order to show cause for a preliminary injunction, pursuant to Rule 65, Fed. R. Civ. P., to enjoin defendant British American Commodity Options Corp. ("British American") from making use of the mails or any means or instrumentality of interstate commerce in violation of Section 4^m of the Commodity Exchange Act, as amended ("the Act"), 7 U.S.C. §6^m,^{1/} In a decision read into the record on October 6, 1976 (Appendix A), the court denied defendant's cross-motion to dismiss the action pursuant to Rule 12(b) (1), (2) and (6), Fed. R. Civ. P., for lack of jurisdiction and for the failure of the complaint to state a claim upon which relief can be granted and, pursuant to Rule 65, Fed. R. Civ. P., ordered an evidentiary hearing on the preliminary injunction motion which was held on the same day. After plaintiff CFTC rested its case defendant British American moved for a directed verdict pursuant to Rule 50 Fed. R. Civ. P. The court reserved decision on the motion. For the reasons stated herein, the court directs a verdict for the defendant and denies plaintiff's motion for a preliminary injunction.

At the evidentiary hearing plaintiff introduced evidence solely on the issue of whether the defendant qualified as a "commodity trading advisor" under Section 2(a)

of the Act, 7 U.S.C. §2,^{2/} and therefore was required to register with the CFTC under Section 4m of the Act, supra. This evidence was adduced through eight witnesses whose testimony was limited solely to showing that employees of British American gave advice over the phone on commodity options as an investment vehicle and mailed explanatory pamphlets to customers and potential customers.

The only other relevant testimony introduced at the hearing, in the form of exhibits, was the "commodity trading advisor" registration application of British American filed in March 1976 and other exhibits relating to the status of the administrative law proceeding.

The CFTC has brought this preliminary injunction motion pursuant to the authority granted in Section 6c of the Act, 7 U.S.C §13a-1, which provides that:

Whenever it shall appear to the (CFTC) that any . . . person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, . . . the (CFTC) may bring any action in the proper district court of the United States . . . to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder Upon a proper showing, a permanent or temporary injunction . . . shall be granted without bond.

In all material respects this provision is identical to the injunctive provision in the Securities Act of 1933, §20(b), 15 U.S.C. §77t (b) and in the Securities

Exchange Act of 1934, §21(e), 15 U.S.C. §78u(e). Accordingly, case law developed under the injunctive provisions of the securities laws is pertinent to the case at bar. CFTC v. J.S. Love & Associates Options, Ltd., ¶20,198, CCH Comm. Fut. L. Rptr. at 21,106-07 (S.D.N.Y. 1976).

CFTC enforcement actions seeking injunctive relief, like Securities and Exchange Commission ("SEC") actions, are not governed by the criteria that apply in private injunction suits. SEC v. Management Dynamics, inc., 515 F.2d 801,808 (2d Cir. 1975). Proof of irreparable injury or the inadequacy of other remedies as in a private injunction suit is not required. Id.: III L. Loss, Securities Regulation 1979 (1961, Supp. 1969). However, the issuance of an injunction is always subject to the principles of equitable discretion. Hecht Co. v. Bowles, 321 U.S. 321, 328-30 (1944); SEC v. Texas Gulf Sulphur, 312 F. Supp. 77, 87 (S.D.N.Y. 1970), aff'd in part and rev'd in part, 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971). Section 6c of the Act requires that "a proper showing" be made before a preliminary injunction "shall be granted". Such language affords no sufficient basis for concluding that Congress meant special weight to be given the CFTC's decision to institute suit. See SEC v. Frank, 388 F.2d 486, 491 (2d Cir. 1968). As stated by the Second Circuit Court of Appeals in SEC v. Management Dynamics, 515 F.,2d at

808 (citations omitted):

We scarcely mean to imply that judges are free to set to one side all notions of fairness because it is the SEC, rather than a private litigant, which has stepped into court. . . . "[I]n deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts." See CFTC v. J.S. Love Assoc., supra at 21,107.

If Congress had intended that the courts refrain from exercising their sound discretion in equity jurisdiction, it would have had to say so in unequivocal language in the Act. See Hecht Co. v. Bowles, supra at 327-29; SEC v. Frank, supra at 491. In deciding whether to grant a preliminary injunction in this case:

The only question presented at this stage of the proceedings, namely an application for a preliminary injunction in advance of a trial upon the merits, (before the administrative law judge) is whether a violation. . . has been so clearly established that defendants are, in effect, to be found at fault without awaiting the development of all the facts upon a trial. SEC v. Capital Gains Research Bureau, Inc., 306 F.2d 606, 608 (2d Cir. 1962) (en banc), rev'd on other grounds, 375 U.S. 180, 84 S. Ct. 275, 11 L. Ed. 2d 237 (1963); see SEC v. Management Dynamics, supra at 807 n. 1.

While the facts presented at the hearing in this case indicate, for the limited purpose of this preliminary injunction motion, that British American qualifies as a "commodity trading advisor",^{3/} this conclusion alone is not enough to grant CFTC's preliminary injunction. Under

Section 4m of the Act, if British American is a "commodity trading advisor" it must register with the CFTC to do business. However, British American did file a registration application in March 1976. CFTC asserts that it rejected British American's application on April 16, 1976; that Section 4m of the Act prohibits doing business while unregistered: and that, therefore, this court must grant a preliminary injunction prohibiting British American from doing business.

CFTC's argument ignores the equity discretion of this court, and its logic falls upon a closer examination of the Act and CFTC's actions against British American. The Act generally provides for automatic registration of applicants with the CFTC upon the expiration of a thirty-day period after an application is filed, Section 4n(2) of the Act, 7 U.S.C. §6n(2); ^{4/} see Appendix A at 5. Even in those situations where the CFTC decides that registration should be denied, in almost all cases such denial can only come after an opportunity for a hearing. See Section 4(n)7 and 8a(2) of the Act, 7 U.S.C. §§6(n) (7) ^{5/} & 12a(2). ^{6/} In one situation, where a person is subject to an outstanding order under the Act denying trading privileges or revoking registration, registration can be denied without ever providing for a hearing. Section 4n(6) of the Act, 7 U.S.C. §6n(6). ^{7/} Finally, under three special situations, the Act allows registration to be denied prior to a final

determination in the administrative proceeding.^{8/} Section 8a(2) (C), supra ("Provided, that pending final determination under clause (B) or (C), registration shall not be granted"); see Appendix A at 6-7. The first two special situations, conceded by the CFTC not to be at issue in the case at bar, are when minimum financial requirements are not met, Section 8a(2) (C) of the Act, supra, and when a person with certain specified interests in the registering corporation has been convicted of a felony or has committed other specified acts. Section 8a(2)(B)(i) of the Act, supra.

CFTC assertedly denied British American's registration and brings this preliminary injunction action pursuant to the third special situation, Section 8a(2)(B)(ii) of the Act:

The (CFTC) is authorized. . . to refuse to register any person. . . if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made. . . (ii) for other good cause shown. See Appendix A at 6.

CFTC asserts that because it found "other good cause" and denied British American's registration, this court must grant a preliminary injunction denying British American the opportunity to do business pending the final determination of the administrative hearing on whether British American is fit to be registered as a "commodity trading advisor".

Such an automatic result is contrary to the equity discretion of this court and is too harsh a result for British American. At the hearing before this court CFTC offered no evidence to support its finding of "good cause shown" and no evidence as to why the public interest requires prohibiting British American from doing business pending the final determination of the administrative proceeding. CFTC did not allege nor offer any proof that British American defrauded or misled its customers or in any way conducted its business illegally or unethically.

The only indication in the record of CFTC's reasons for denying British American's registration are two outstanding consent decrees with the SEC against the principal owner of British American, John Forma.^{9/} No background leading up to the entering of these decrees nor any evidence of past illegal behavior of John Forma were offered. While the court expresses no opinion as to whether these consent decrees are grounds for a final determination of unfitness to be registered, these bare consent decrees, without any indication of unfair dealing by British American, do not constitute a "proper showing" for a preliminary injunction prior to the final determination of the administrative proceeding.

The CFTC cites a July 1975 release of "Standards of Denial of Registration" to support its position that an SEC consent decree is a criterion included in "for other

good cause shown" under Section 8a(2)(B)(ii) of the Act. 40 Fed. Reg. 28125 (July 3, 1975). The release, however, only indicates that registration can be denied "for other good cause shown" "after opportunity for hearing" (emphasis added).^{10/} This failure to indicate that "good cause shown" is a grounds for a pre-hearing denial of registration gave British American no notice that by their going into business and applying for registration as "commodity trading advisors" they could not take advantage of automatic registered status at least until an opportunity for a hearing. In an act that generally provides for automatic registration or at least requires a hearing prior to denial of registration, routine pre-hearing injunctions resulting from an expansive use of "other good cause shown" would undercut the intent of the Act.

The CFTC's position that this court must grant a preliminary injunction once CFTC has met its burden of showing British American is a "commodity trading advisor" ignores this court's discretion in equity jurisdiction. See Hecht Co. v. Bowles, supra at 327-30; SEC v. Management Dynamics, supra at 807-09. A critical question in granting an injunction is whether "there is a reasonable likelihood that the wrong will be repeated." SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972); see SEC v. Management Dynamics, supra at 807. Here the mere continuation of business after the CFTC has found

"good cause" to deny registration is not the necessary repetition of a wrong to grant an injunction. Rather, there must be some indication that a wrong connected with fraud or misconduct, herein related to the alleged activity that led up to the consent decree, is to be repeated. The CFTC introduced no evidence of any illegal behavior of John Form either leading up to the consent decree or repeated with British American. Absent such repetition, a preliminary injunction cannot be granted under the facts of this case.

The court in its discretion is deciding upon the requested preliminary injunction must balance the public interest against the private interest of British American. On one side, "[i]n the formulation of its discretion [the court] recognize[s] that the public interest, when in conflict with private interest, is paramount." SEC v. Culpepper, 270 F.2d 241, 250 (2d Cir. 1959); see SEC v. Management Dynamics, supra at 809 n. 5. However, "[t]he adverse effect of an injunction upon defendants is, of course, a factor to be considered." SEC v. Broadwall Securities, Inc., 240 F. Supp. 962, 967 (S.D.N.Y. 1965); see SEC v. Harwyn Industries Corp., 326 F. Supp. 943, 957 (S.D.N.Y. 1971); CFTC v. J.S. Love & Assoc., supra at 21,107.

In this case British American since October 1975 has built up a business with approximately one hundred em-

ployees, one million dollars in net worth,^{11/} and close to two thousand customers. Enjoining it from doing business until a final determination of the administrative proceeding now set for a hearing before the administrative law judge on November 15, 1976 would be too harsh a result.^{12/} If the administrative law judge decides after a full hearing on the merits that British American is fit to be registered, a prior preliminary injunction would in the short time prior to that final determination have irreparably injured British American's business, forcing their employees out of work. British American's customers would also be hurt. British American does not charge when a customer closes out its transaction. With British American out of business, its customers would have to pay another dealer to close out their options. If the administrative proceeding results in a final determination denying registration, the finding would put British American out of business. In the interim, British American, with no evidence that it is mistreating or misleading its customers or the general public does no apparent harm to the public interest by being allowed to do business. The purposes that would be served by issuance of a preliminary injunction are outweighed by the "harmful impact on the business reputation. . . and legitimate business activities" of British American. SEC v. Harwyn Industries, supra at 957; sec CFTC v. J.S. Love & Assoc., supra at 21,107.

After consideration of the record, testimony at the hearing and other circumstances, the court concludes in the exercise of its discretion that a preliminary injunction against British American is unwarranted. As a result, the court grants defendant's request for a directed verdict. This decision is in no way an indication on the merits of the issues to be decided before the administrative law judge.

The foregoing constitutes the court's finding of fact and conclusions of law as required by Rule 52(a) Fed. R. Civ. P.

So Ordered.

U.S.D.J.

Dated: New York, New York
October 20, 1976

FOOTNOTES

1. 7 U.S.C.

§ 6m. Same; use of mails or other means or instrumentalities of interstate commerce

It shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this chapter, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator: *Provided*, That the provisions of this section shall not apply to any commodity trading advisor who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor.

2. 7 U.S.C. §2

The term "commodity trading advisor" shall mean any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include (i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, (v) any contract market, and (vi) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order:

3. British American contests that it is a "commodity trading advisor" and filed its registration application without conceding that the CFTC had jurisdiction over its activities. See Appendix A at 2. This issue must be finally determined in the administrative proceeding and the finding in the case at bar in no way prejudices the merits of British American's claim.

4. 7 U.S.C. §6n

(2) Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission, or within such shorter period of time as the Commission may determine.

5. 7 U.S.C. §6n

(7) The Commission after hearing may by order deny registration, revoke or suspend the registration of any commodity trading advisor or commodity pool operator if the Commission finds that such denial, revocation, or suspension is in the public interest and that—

(A) the operations of such person disrupt or tend to disrupt orderly marketing conditions, or cause or tend to cause sudden or unreasonable fluctuations or unwarranted changes in the prices of commodities;

(B) such commodity trading advisor or commodity pool operator, or any partner, officer, director, person performing similar function or controlling person thereof—

(i) has within ten years of the issuance of such order been convicted of any felony or misdemeanor involving the purchase or sale of any commodity or security, or arising out of any conduct or practice of such commodity trading advisor or commodity pool operator or affiliated person as a commodity trading advisor or commodity pool operator; or

(continued)

(11) at the time of the issuance of such order, is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction from acting as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or as an affiliated person or employee of any of the foregoing, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of commodities or securities; or

6. 7 U.S.C.

§ 12a. Registration of commission merchants and brokers; fees; rules and regulations; publication of harmful acts; disapproval of by-laws, etc.

The Commission is authorized—

(2) to refuse to register any person—

(A) if the prior registration of such person has been suspended (and the period of such suspension shall not have expired) or has been revoked;

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (1) because such applicant, or, if the applicant is a partnership, any general partner, or, if the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, at any time engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or was debarred by any agency of the United States from contracting with the United States, or the applicant willfully made any material false or misleading statement in his application or willfully omitted to state any material fact in connection with the application, or (2) for other good cause shown; or

(C) in the case of an applicant for registration as futures commission merchant, if it is found after opportunity for hearing that the applicant has not established that he meets the minimum financial requirements under section 6f of this title: *Provided*, That pending final determination under clause (B) or (C), registration shall not be granted: *And provided further*, That the applicant may appeal from a refusal of registration under clause (B) or (C) in the manner provided in section 9 of this title; and

7. 7 U.S.C. §6r

(6) The Commission is authorized, without hearing, to deny registration to any person as a commodity trading advisor or commodity pool operator if such person is subject to an outstanding order under this chapter denying to such person trading privileges on any contract market, or suspending or revoking the registration of such person as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or suspending or expelling such person from membership on any contract market.

8. Section 8a(2) of the Act may also in certain instances be violative of constitutional due process. Appendix A at 6 n. 6.

9. 1. Consent Judgment of Permanent Injunction in 70 Civ. 1743 (S.D.N.Y.) and consents of John Forma and John Forma Securities, Inc.
2. Consent Judgment of Permanent Injunction in 73 Civ. 643 (S.D.N.Y.) and consents of John Forma and Forma Securities, Inc.

10. CFTC "Standards for Denial of Registration", 40 Fed. Reg. 28125-26:

...However, other provisions in section 8a(2) are not so specific, such as the authority after opportunity for hearing to deny registration for having engaged in a practice of the character prohibited by the Act. In addition, the Commission is authorized, after opportunity for hearing, to deny registration if "for other good cause shown", the applicant is unfit to engage in the business for which he has made application for registration. These criteria are not specific and need Commission interpretation. The Commission has interpreted "for other good cause shown" to include the following:

* * *

(ii) At the time of the application is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction, or by agreement or settlement to which the Commission or the Securities and Exchange Commission is a party from acting as a commodity trading advisor.

* * *

This interpretation regarding "for other good cause shown" is not exclusive; i.e., there may be other instances for which the Commission, after opportunity for hearing, may determine to deny registration. (emphasis added)

11. Affidavit of John Forma in Opposition to Plaintiff's Request for a Preliminary Injunction, p.2 (August 6, 1976).
12. The CFTC waited until July 22, 1976 to bring its preliminary injunction action. If CFTC's allegations are correct, an action could have been commenced shortly after it learned in October 1975 and before British American had developed its sales force and its clientele to its present strength. CFTC even chose to wait an additional three months after April 16, 1976, the date it acted, pursuant to Section 8a(2)(B) of the Act to deny British American's application, to bring this action.

APPENDIX A

Plaintiff Commodity Futures Trading Commission ("CFTC") moves for a preliminary injunction to enjoin defendant British American Commodity Options Corp. ("British American") from making use of the mails or any means or instrumentality of interstate commerce in violation of Section 4m of the Commodity Exchange Act, as amended ("the Act"). 7 U.S.C. Section 6m.^{1/} The defendant cross-moves to dismiss the action pursuant to Rule 12(b)(1), (2) and (6) Federal Rules of Civil Procedure, for lack of jurisdiction and for the failure of the complaint to state a claim upon which relief can be granted.

This court has jurisdiction under Section 6c of the Act, 7 U.S.C. Section 13a-1,^{2/} where the defendant transacts business within this district or where alleged violations of the Act have occurred within this district. For the reasons stated herein, the court denies defendant's motions to dismiss and orders an evidentiary hearing to determine whether British American should be enjoined from doing business as a commodity trading advisor pending the conclusion of the administrative proceeding now ongoing.

Plaintiff CFTC is a duly constituted independent regulatory agency of the United States of America which, since April 21, 1975, has been charged with the responsibility for administering and enforcing the various

provisions of the Act. 7 U.S.C. Section 1 et seq.

Defendant British American, incorporated under the laws of the State of New York in October 1975, is engaged in the purchase and sale of London Commodity options, which are options to purchase certain commodity futures contracts.

This court heard oral argument on all of the motions in this case on September 24, 1976. Certain facts, necessary to the determination of the motions in this case, were stipulated to by the parties on the record or in their papers submitted to the court. These facts are set forth in chronological order. On or about March 3, 1976 the Division of Enforcement of the CFTC orally advised the defendant that it was the CFTC's position that defendant qualified as a "commodity trading advisor" under Section 2(a) of the Act. 7 U.S.C. Section 2,^{3/} and should register with the CFTC as required by Section 4m of the Act, supra. Thereafter, on March 17, 1976, British American, without conceding that the CFTC had jurisdiction over its activities, filed an application for registration on Form CFTC 5-R. The application was returned with a request for additional biographical data. The application was resubmitted on March 23, 1976. On April 16, 1976 the CFTC filed a "Complaint and Notice of Hearing pursuant to Section 4(n)7 and 8a(2) of the Commodity Exchange Act, as amended." 7 U.S.C. Sections 6(n)7^{4/} and 12a(2).^{5/} The Complaint alleged

that the defendant is unfit to be registered as a commodity trading advisor. The final determination of this question was referred to an administrative law judge and a prehearing conference is scheduled to take place before Administrative Law Judge Hunt on October 8, 1976. The CFTC in the Complaint stated that it deemed it appropriate not to grant registration to the defendant pending final determination of the administrative hearing. The instant claim was instituted here in this court by order to show cause on July 22, 1976.

At the outset, the defendant British American's motions to dismiss the CFTC's action must be denied in all respects. The doctrine of primary jurisdiction has no application to this motion for a preliminary injunction. The pendency of an administrative proceeding is irrelevant. CFTC specifically seeks to enjoin the defendant from doing business pending the final determination of the administrative proceeding. Section 6c of the Act, supra, allows the CFTC to bring such an action in federal court and the specific language of the Act, as described in detail below, allows the CFTC to act before the administrative proceeding is completed. See Section 8a(2)(B) and (C) of the Act, supra. As set forth below, until British American is registered it is prohibited by the Act from doing business as a commodity trading advisor. Because of the CFTC's action under Section 8a(2) of the Act, British American cannot be

registered unless and until after a hearing its fitness to be registered is determined. This action only seeks to preliminarily enjoin the defendant until there is a final determination in that hearing. If it is in the public interest to stop British American from doing business, CFTC need not wait, while the unregistered defendant makes unauthorized transactions, until the administrative hearing is complete. As such, on the face of its complaint, the CFTC has stated a cause of action.

The Commodity Futures Trading Commission Act of 1974 authorizes the CFTC to seek injunctive relief in the appropriate United States District Court to enjoin violation of provisions of and rules promulgated under the Act and to enforce compliance with the Act. Section 6c of the Act, supra. This court, before it can grant the requested preliminary injunction, must first review the CFTC's actions to determine whether they comply with the requirements of the Act. If the court finds that the CFTC's actions are in compliance with the Act, it must then, in accordance with the standards established in this Circuit, set the matter down for an evidentiary hearing, as it is in doing today, to independently judge the need for a preliminary injunction. And the appropriate citations are: SEC v. Management Dynamics, 515 F.2d 801, pages 806 and 807; SEC v. Frank, 388 F.2d 486, at pages 491-92; and CFTC v. J.S. Love & Associates, 76 Civ. 928, in the Southern District of New York, this year.

The court must first examine the statutory language and relevant legislative history and CFTC rules and regulations. Section 4n(2) of the Act, 7 U.S.C. Section 6n(2), is the starting point of an examination of CFTC's claim that British American is not registered.

That section provides as follows:

"Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission, or within such shorter period of time as the Commission may determine."

This automatic registration provision is not affected where the CFTC, in accordance with the "as hereinafter provided" language acts within thirty days. In this case a question has arisen as to whether the registration period began on March 17 or March 23, 1976, which is the date of the amended application. Even with the first date applicable, the CFTC's actions on April 16, 1976 are within the required thirty-day period. Under the CFTC Rules of Practice Chap. 1 Section 10.5, the date of filing is not included in the computation of time. 41 Federal Register 2512, filed on January 16, 1976.

Consequently, the CFTC action is within the thirty days to prevent the automatic registration under Section 4n(2) of the Act.

A careful examination of the statute shows that CFTC's actions on April 16, 1976 satisfy the "as hereinafter provided" exception to 4n(2). First, while the Act is unclear as to whether the "as hereinafter provided" language applies only to Section 4n or to the entire Act, the legislative history makes it clear that the language means "as provided elsewhere in the Act." Senate Report No. 93-1131, 93rd Cong. 2d Sess. Section by Section Analysis, Section 205(1974).

The CFTC therefore properly alleges that it is acting pursuant to Section 8a(2) of the Act, supra. Specifically, under Section 8a(2) (B)(ii) of the Act, the CFTC is:

[A]uthorized to refuse to register any person. . . if it is found after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made. . . . (ii) for other good cause shown.

While this language appears to require a hearing prior to the denial of registration, Section 8a(2)(C) of the Act specifically states:

"Provided, That pending final determination under clause (B) or (C), registration shall not be granted." The initial decision not to grant registration can be made by the CFTC prior to any hearing being required.^{6/} This clear meaning of the Act is reinforced in the legislative history, which states:

In determining whether to register an applicant for a full period, the Commission may refuse to grant such registration for any of the reasons specified in Section 8a(2) of the Commodity Exchange Act, as amended, and the Commission may do so "pending final determination" as provided in that section. Senate Report No. 94-73, 94th Cong. 1st Sess. 5(1975).

Once CFTC determined that British American is a "commodity trading advisor" and denied its application for registration for what it determined to be "good cause shown," CFTC could properly allege that British American's use of the mails or any means or instrumentality of interstate commerce in connection with its busi-

ness as a commodity trading advisor was in violation of Section 4m of the Act, supra. The CFTC could properly bring an injunctive proceeding in this court to restrain such use of the mails or interstate commerce pending a final determination of the administrative proceeding. Section 6c of the Act, 7 U.S.C. Section 13a-1. This court must determine if there are proper grounds for granting a preliminary injunction in this case and accordingly is prepared to proceed with the evidentiary hearing.

It is so ordered.

FOOTNOTES

1. 7 U.S.C.

§ 6m. Same; use of mails or other means or instrumentalities of interstate commerce

It shall be unlawful for any commodity trading advisor or commodity pool operator, unless registered under this chapter, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator: *Provided*, That the provisions of this section shall not apply to any commodity trading advisor who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor.

2. 7 U.S.C.

§ 13a—1. Action to enjoin or restrain violations; compliance; writs and orders; jurisdiction and venue; process

Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the Commission may bring an action in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this chapter, or any rule, regulation or order thereunder, and said courts shall have jurisdiction to entertain such actions: *Provided*, That no restraining order or injunction for violation of the provisions of this chapter shall be issued *ex parte* by said court. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

* * * Any action under this section may be brought in the district where the defendant is found or is an inhabitant or transacts business or in the district where the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found. In lieu of bringing actions itself pursuant to this section, the Commission may request the Attorney General to bring the action. Where the Commission elects to bring the action, it shall inform the Attorney General of such suit and advise him of subsequent developments.

3. 7 U.S.C. § 2

* * *

[The term "commodity trading advisor" shall mean any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include (i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, (v) any contract market, and (vi) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order:

4. 7 U.S.C. § 6n

(7) The Commission after hearing may by order deny registration, revoke or suspend the registration of any commodity trading advisor or commodity pool operator if the Commission finds that such denial, revocation, or suspension is in the public interest and that—

(A) the operations of such person disrupt or tend to disrupt orderly marketing conditions, or cause or tend to cause sudden or unreasonable fluctuations or unwarranted changes in the prices of commodities;

(B) such commodity trading advisor or commodity pool operator, or any partner, officer, director, person performing similar function or controlling person thereof—

(continued)

(i) has within ten years of the issuance of such order been convicted of any felony or misdemeanor involving the purchase or sale of any commodity or security, or arising out of any conduct or practice of such commodity trading advisor or commodity pool operator or affiliated person as a commodity trading advisor or commodity pool operator; or

(ii) at the time of the issuance of such order, is permanently or temporarily enjoined by order, judgment or decree of any court of competent jurisdiction from acting as a commodity trading advisor, commodity pool operator, futures commission merchant, or floor broker, or as an affiliated person or employee of any of the foregoing, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of commodities or securities; or

5. 7 U.S.C.

§ 12a. Registration of commission merchants and brokers; fees; rules and regulations; publication of harmful acts; disapproval of by-laws, etc.

The Commission is authorized—

* * *

(2) to refuse to register any person—

(A) if the prior registration of such person has been suspended (and the period of such suspension shall not have expired) or has been revoked;

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant, or, if the applicant is a partnership, any general partner, or, if the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, at any time engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or was debarred by any agency of the United States from contracting with the United States, or the applicant willfully made any material false or misleading statement in his application or willfully omitted to state any material fact in connection with the application, or (ii) for other good cause shown; or

6. The statutory language covering the requirement and timing for a hearing under the Commodity Exchange Act, as amended, is very different from the mere specific language in other regulatory acts. For example, Section 11 of the Securities Exchange Act, as amended, 15 U.S.C. §78o (1975), specifically requires that a registration hearing for brokers and dealers be held and concluded within 120 days of the date of filing the application for registration (to be extended up to 90 additional days for good cause). 15 U.S.C. §78o(b)(1)(B). While the CFTC's failure to hold a timely hearing is not a violation of the Commodities Exchange Act, it may in some instances be violative of constitutional due process. This court notes, however, that in this case to date there have been no unreasonable delays in the holding of the hearing and because British American has been allowed to trade while not registered, there could in any case be no prejudice due to postponements in the hearing.

qtw

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

BRITISH AMERICAN COMMODITY
OPTIONS CORPORATION,

Defendant.

Civil Action No.
76 Civ. 3247 (LPG)

NOTICE OF APPEAL

Notice is hereby given that the Commodity Futures Trading Commission, plaintiff herein, hereby appeals to the United States Court of Appeals for the Second Circuit from an Opinion and Order entered in this action on October 20, 1976, which granted defendant's motion for a directed verdict and denied plaintiff's motion for a preliminary injunction.

LESLIE A. BLAU
Regional Counsel
Division of Enforcement
Commodity Futures Trading
Commission
One World Trade Center
Suite 4747
New York, New York 10048
Attorney for Plaintiff

Dated: December 17, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

BRITISH AMERICAN COMMODITY
OPTIONS CORP.

Defendant

X

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X

AFFIDAVIT OF CHARLES J HECHT
IN OPPOSITION TO PLAINTIFF'S
REQUEST FOR A PRELIMINARY
INJUNCTION

76 Civ. 3247 (GOETTEL)

STATE OF NEW YORK }

ss:

COUNTY OF NEW YORK }

Charles J. Hecht, being duly sworn, deposes and says:

1. That he is the attorney for the defendant herein
{"British American"} and submits this affidavit in opposition to
the plaintiff's request for a preliminary injunction which was
originally returnable pursuant to an Order to Show Cause on
July 26, 1976.

2. After the conference in Judge Gaglianxi's chambers on
July 27, 1976 deponent and Charles Harris called a customer of
British American, Harold Hartlaub. As to the substance of the
written communication he was anything but vague and confused.
He also reaffirmed that there were no questions on such communi-
cation and that he was not on any government mailing list. He

did not recall whether there was any letterhead and stated that he had received this communication more than one week prior thereto.

3. Since the CFTC injunction action was only filed on July 22, 1976, how did British American's customers become aware of this prior to July 22, 1976? There are only two possibilities: (i) some employee at the CFTC sent this out without the knowledge or consent of Mr. Harris or (ii) that an employee of the CFTC is leaking this information to one of British American's competitors.

4. Although deponent does not question the integrity of Mr. Harris that he personally was unaware of these "business destruction" letters, the basis for his knowledge is that since everything to do with British American must be cleared by him and this did not come across his desk is of small comfort to deponent or my client. He is only one of many employees of that agency.

5. After the conference of July 27, 1976 Mr. Harris requested a ten day extension "in the best interests of all parties" from the original extension of the return date of the Order to Show Cause in their injunctive suit to August 2, 1976. On July 28, 1976 deponent prepared and executed a stipulation to that effect which was sent to him in Washington to execute and file with the Court. At that time deponent was totally unaware of the impending public relations campaign which is now destroying the business of British American. In this connection, on August 2, 1976 after checking with the Clerk's office and

seeing that the stipulation was not filed deponent telephoned Mr. Harris who advised him that he never received the stipulation. Rather than take any chances, British American's motion to dismiss was filed on that date. Subsequent to the filing of defendant's motion to dismiss Mr. Harris advised deponent that he was in receipt of said stipulation as of August 3, 1976 and had filed the same with the Court.

6. At approximately 5:15 P.M. on Friday July 30, 1976 deponent received a phone call from Richard Donnelly of Barron's who stated that he had spoken to the CFTC about this recent suit and he would now like my client's side of the story.

7. Initially, deponent asked Mr. Donnelly who he spoke to at the CFTC and he refused to divulge his source at the CFTC.

8. Deponent then asked if Mr. Donnelly was aware of the other litigations between the parties and he said he was not.

9. Deponent then stated that it was his opinion that under the circumstances relating to the CFTC and British American it would only be proper to review all of the public documents before characterizing the positions of the parties in the various litigations and offered Mr. Donnelly the use of my library to review the Appendix to our motion, which contains all of the filed documents in the other litigations, and the CFTC papers in their injunctive action. His response was that he did not have time to review the filed papers and that he would base his article on his conversations.

10. Deponent refused to characterize the position of the parties but did consent to the use of the limited quote attributed to him contained in the article.

11. Deponent is fully aware of the First Amendment. Reportorial slanting is something everyone has to live with. But the deliberate feeding to the press of a blatantly false statement that British American's registration application was "turned down" is something which no Court should condone, especially in view of the past practices of the staff of the CFTC towards British American.

12. The reason the staff of the CFTC has all of a sudden elected to file this Complaint is self evident. It has now become obvious to them that not only has their extensive complaint solicitation program not produced any evidence of customer abuses and possible fraud, defendant's business has continued to prosper. The papers filed in the administrative proceeding to date {Items 1 through 14 of the Appendix} indicate that substantially all of the grounds urged by the staff as a basis for denial of defendant's registration statement are legally insufficient under the statutory scheme. Furthermore, the staff is fully cognizant that as a factual matter defendant can prove that it is not in the "public interest" to put defendant out of business. The Administrative Law Judge has, in his discretion, ordered a stay and directed the staff to submit papers to refute the serious questions raised by respondent as to the legal sufficiency of certain allegations in the Complaint and Notice of Hearing. Realizing that there

is a substantial likelihood that defendant will prevail at the conclusion of the administrative proceeding, the staff is now attempting to put British American out of business so that there is no one left to contest the administrative proceeding.

13. During the course of discussions between deponent and various members of the staff of plaintiff, they have often stated that it is their view that the administrative proceeding is a mere technical formality so that British American cannot contend that they were denied due process as a rationalization for their position that defendant's registration application has been denied. However, this directly contradicts the language in their Complaint and Notice of Hearing to the effect that there be a public proceeding to determine whether defendant's application should be denied.

14. Accordingly, it is deponent's belief that the term phrase "British American's application has been turned down" appearing in Barron's on August 2, 1976 could only have come from one source - a misguided employee of plaintiff who wants to destroy defendant's business without any semblance of due process.

15. The effect of the publication of such false and misleading information has already had a substantial detrimental impact on defendant's business as shown in the affidavit of John Forma sworn to on August 6, 1976.

16. On August 6, 1976 deponent was requested to speak to certain of the salesmen employed at its main office who had advised the company that they had received telephone calls from Bristol Commodities on August 5 and August 6, a competitor of defendant, that Bristol had called the CFTC and was told that criminal indictments would be brought against all of the salesmen who stayed with British American and that the CFTC was putting British American out of business. One of the salesmen stated that he had called the CFTC in Washington to verify this.

17. Prior to taking any action another telephone call was placed to Washington to verify what the CFTC was telling the general public. Attached hereto is the transcript of that telephone conversation which was recorded. The transcript speaks for itself but three important items should be emphasized: {i} it is a slanted one-sided version of the facts; {ii} their admission that British American will probably prevail in the administrative proceeding, which is something the average person would not comprehend the importance of in view of the pending injunctive action and {iii} their desire to put British American out of business at all costs.

18. Deponent believes that the use of undisclosed fictitious names and entrapment techniques by employees of a federal regulatory agency is an abhorrent tactic, especially when the staff's unauthorized and I contend illegal and improper complaint solicitation program has not turned up any evidence detrimental to defendant. Not only have they substantially impaired defendant's right of cross examination of these

persons since we do not know the fictitious names utilized by such persons but given the biased position of the staff such affidavits, which are almost completely unrelated to the legal basis of the Complaint, do not demonstrate any evidence of wrong doing by defendant's salesmen.

19. It is deponent's understanding that the plaintiff intends to submit an additional Memorandum of Law on primary jurisdiction and possibly argue that if the Complaint is not dismissed there is no need for an evidentiary hearing on their motion for a preliminary injunction. Under the facts in this case deponent believes that even if the Court denies defendant's motion to dismiss, which is doubtful, such a position as to the lack of need for an evidentiary hearing is wholly untenable and contrary to Rule 52 of the Federal Rules of Civil Procedure and the substantial body of law under the federal securities laws in somewhat analogous situations. If such contention is put forward by the plaintiff at this late date, defendant requests that the Court permit the defendant to file a supplemental Memorandum of Law.

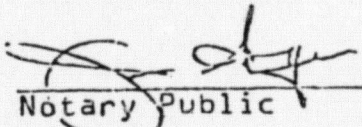
20. This latest tactic by the staff of the plaintiff is clearly inconsistent with and contrary to the over-all regulatory function of this agency as formulated by the Congress. Although there have been intermittent settlement discussions between the staff and the defendant they have not been fruitful because the staff has insisted that John Forma must dispose of more than 90% of his stock in British American. To utilize a consent without admitting or denying the substantive allegations, in an administrative proceeding which

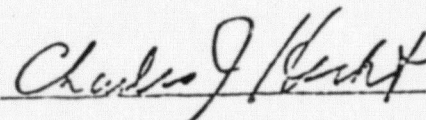
arose out of events over three years ago in another industry as a punitive measure, where Mr. Forma has built up a successful business, is clearly inconsistent with the proper performance of the staff's regulatory function.

21. In conclusion, the CFTC's use of an injunctive suit at this time and the detrimental impact of this suit on defendant's business should not be condoned and it is imperative in the interests of justice that the Complaint be promptly dismissed with costs and expenses awarded to the defendant.

JEROME SAGER
NOTARY PUBLIC, State of New York
No. 41-4514908
Qualified in Queens County
- Cert. filed in Queens County
Commission Expires March 30, 1979

Sworn to before me
this 9th day of
August, 1976


Notary Public


CHARLES J. HECHT

Transcript of Telephone Conversation

August 6, 1976

Good Afternoon, Commodity Futures Trading Commission.

Mr. Mathas: Good Afternoon, I wonder if you could put me in contact with the proper person please, I guess in the enforcement division, I'd like some information about a firm that deals in commodity options.

All right, lets see, you want to find out about the fitness of the company?, I'm going to transfer you to 254-9703, in case we're cut off.

Mr. M: 9703?, Thank-you.

Yes, operator, would you transfer this please to 254-9703?

Operator: Okay.

Registration, May I help you?

Mr. M: Yes, please, I wonder if you could give me some information about a firm dealing in commodity options?

This is a bad day for registration, both the secretaries are out and there's no one here but Tom Allar, and he's handling another call right now, can I have him return the call?

Mr. M: May I hold on please?

I think it will be a long wait, someone is holding.

Mr. M: What is the gentleman's name, Tom Allar? A-l-l-e-r, Okay, I'll give him a ring back, thank-you very much.

Registration, Tom Allar

Mr. M: Tom Allar please.

Mr. Allar: Yes, speaking.

Mr. M: My name is Paul Mathas, I would like some information from you if you are the proper source to call concerning a firm trading in commodity options.

Mr. A: Okay, let me put you on hold, I have to finish up on another call.

Mr. M: Sure, I'll hold on.

Mr. A: Yes, go ahead.

Mr. M: Yes, you can give me information about a firm trading in commodity options.

Mr. A: I can tell you if they're registered.

Mr. M: You can tell me if their registered, the firm name is British American Commodity Options, they're on Wall Street.

Mr. A: No, they're not registered and there is a couple of law suits against them.

Mr. M: A couple of law suits against them?

Mr. A: Thats right, we're trying to get an injunction in one of the district courts in New York, this is British American, right -

Mr. M: Right.

Mr. A: and to enjoin them from operating and there's also an administrative action the commission has underway dealing with their misrepresentations and other problems in their operations.

Mr. M: They're misrepresenting themselves?

Mr. A: Yes

Mr. M: They are misrepresenting themselves. How would they do that?

Mr. A: Let me put you on hold a second.

Mr. M: Thank-you

Mr. A: Okay, let me ask you, first, what number did you call when you first called the commission?

Mr. M: I called you at, I called some other number and the switchboard switched me over here and then I called for you and they said you were with somebody else.

Mr. A: What was the first number you called?

Mr. M: I don't know, all I have is 655-4000, I think it is, and they referred me to you and they said you could give some information about a firm in there. I saw the article in Barrons,

Mr. A: Well, that is what I'm referring to, the article in Barrons, I don't know what the article says but our press release it has to do that the Division of Enforcement of this Commission alleges that the promotional materials used by British American Commodity Options Corp. are fraudulent and deceptive as to the risks involved, the nature of the backing afforded London Options by English agencies and the nature and size of the fee charged its customers for the purchase of such options.

Mr. M: Uh-Uh.

Mr. A: And thats all the details I have, it's not a case we're handling, it's a case the Division of Enforcement is handling,

Mr. M: Are there any indictments against them or any pending against them? Any specific charges, I mean the article said that there were narrow grounds and it just didn't seem very clear - I'd like to know from you if whether I should do business with them or not, if uh, they're really, uh, what would you call them, ripp-off artists?

Mr. A: I just read that the Division of Enforcement alleges that promotional material used is fraudulent and deceptive as to the risks involved, the nature of the backing, the nature and size of the fee charged its customers, in other words it appears they're charging unusually high fees. I don't know what else I can say. Those are the charges.

Mr. M: There's nothing concrete against them, I mean are they allowed to do business in the United States? Are they allowed in fact to market these options?

Mr. A: Well, we have an injunction now in U.S. District Court, for the Southern District of New York. The suit seeks an injunction restraining and enjoining British American from acting in a particular capacity, which means we're trying to prevent them from selling options.

Mr. M: Oh, you want to put them out of business?

Mr. A: That's about the size of it.

Mr. M: Because you don't think they're qualified to do this?

Mr. A: Well, there will be hearings on the matter.

Mr. M: Oh, I see.

Mr. A: They may very well win the hearings, I don't know, but for the moment we're trying to do everything we can to do that, yes.

Mr. M: When you say they're not registered, did they try to register?

Mr. A: That's right, they tried to register and we denied them registration.

Mr. M: I see, could you tell me on what other grounds, I'll let you go then.

Mr. A: Um, yes, the grounds were that a particular individual associated with the firm, the director and sole shareholder of the company was the subject of two federal court injunctions for violations of the S.E.C. Act of 34 and is also barred by the S.E.C. from being in the securities business including the investment advisory business.

Mr. M: Does that have to do with commodities, the commodities business as well or is that just in securities?

Mr. A: We feel that this individual from his past record has exhibited a character of such that we don't want him in our business.

Mr. M: Oh, I see.

Mr. A: Now uh, I'm not sure what you're looking for. It appears to me if I were a customer I would have been, you know, that would be more than enough to make me move on to another firm.

Mr. M: Okay, is that just the one person in the firm or are there other individuals with the firm too? Is that just the general nature of the people of the firm?

Mr. A: Uh, you're really going to have to call Division of Enforcement, it's their case, it was not proper, I guess for you to get in touch here, I don't really know the details of the case.

Mr. M: Okay, could you give me the name of a fellow and a phone number?

Mr. A: Charles Harris

(Mr. M: Charles Harris, and do you have his phone number, Mr. Harris's phone number?

Mr. A: His number - 254-9594.

Mr. M: Thank-you very much,

Mr. A: Okay,

Mr. M: Good day now.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

		X
COMMODITY FUTURES TRADING	:	
COMMISSION,	:	
	:	AFFIDAVIT OF JOHN FORMA
Plaintiff,	:	IN OPPOSITION TO PLAINTIFF'S
	:	REQUEST FOR A PRELIMINARY
v.	:	INJUNCTION
BRITISH AMERICAN COMMODITY	:	
OPTIONS CORP.	:	76 Civ. 3247 (GOETTEL)
	:	
Defendant	:	
		X

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

John Forma, being duly sworn, deposes and says:

1. That he is the President of the defendant herein and is fully familiar with all of the facts and circumstances in this bizarre situation. This affidavit is submitted in opposition to the plaintiff's request for a preliminary injunction.

3. As shown by the Complaint the principal grounds propounded by the plaintiff is that since the defendant is acting as a "commodity trading advisor" prior to the acceptance of its registration statement it must be put out of business until its registration application is accepted.

4. The plaintiff became aware of defendant's existence almost immediately after we were formed and conducted numerous inspections of our books and records between December, 1975 and April 14, 1976.

5. Originally the staff advised deponent that whether or not they had jurisdiction was a gray area but they would still like to inspect our books and records. We voluntarily consented. They then reversed their position and told defendant to register. We promptly filed our registration application. Subsequently, the Commission orders a public administrative proceeding to determine whether or not to accept or reject defendant's registration application.

6. During that period, as the plaintiff well knows, the number of employees increased from seven persons to over one hundred persons and our net worth has gone from \$30,000 to over \$1,000,000.

7. The CFTC also knows from their own inspections that our customers have done extremely well and as of the date of the administrative proceeding over 92% of our customers whose options expired or elected to sell had profits, 5% broke even and 2% lost money. Submitted herewith is an affidavit of George Plave, with an appendix prepared from our books and records, which shows each and every completed customer transaction of British American from the date of its inception to April, 1976 which was prepared to be used at the administrative hearing.

8. After all of this time and after we have built up a successful and well run business, the plaintiff all of a sudden decides that we should be put out of business because we are "not registered" until the administrative proceeding is concluded. What about the right of over one hundred employees to earn a livelihood? What about the rights of our customers who have open option contracts? To now come into Court and demand that we be put out of business is inherently unfair.

9. In addition, the staff advised us in the beginning of April, 1976 that there were between seventy-five and eighty companies specializing in commodity options, substantially all of whom have not even bothered to register. Of course, there are serious jurisdictional questions as to whether or not they come within the definition of a "commodity trading advisor" or whether they have the right to regulate transactions outside of interstate commerce. Based on information and belief they have done nothing as to these people who have not even attempted to register. Why have they selected out British American who has filed in good faith a registration statement?

10. In view of the Goldstein-Samuels situation and the recent J.S. Love situation it has always been my belief that it is in the best interests of the general public, the industry, our customers and the CFTC that this industry should be regulated. Therefore, once the CFTC had made up its mind that we should register the defendant welcomed the opportunity and promptly registered

although deponent was fully aware that this could place British American at a competitive disadvantage.

11. Deponent believes that the plaintiff's allegations as to British American's mark-up is an improper smokescreen since it is totally unrelated to Section 4m of the Act (7U.S.C. S. 6 m). Furthermore, the plaintiff is well aware that defendant's "mark-up" is competitive with other vendors of London commodity options.

12. Plaintiff, which is responsible for regulation in this general area is or should be aware of why the major stock brokerage firms, which deal in commodity futures contracts, have not become engaged in the retail sale of London commodity options - to wit the use of free credit balances resulting from the difference between the amount the brokerage house is required by the commodity exchanges and the amount the brokerage house requires from the customers. For example, a customer of a broker is required to put up \$5,000 to open up a commodity futures account and \$3,000 to purchase a futures soybean contract on 10% margin while the exchange only requires that the brokerage house puts up \$1,000 to purchase the same futures soybean contract. Although the difference of \$7,000 must be segregated by the brokerage house as a free credit balance it can use such funds as a compensating balance or to obtain loans at no or little interest from the bank. When this is multiplied by the

number of customers and/or futures contracts a large brokerage house which is active in futures commodities contracts has upwards of \$100,000,000 to utilize to its advantage. Additionally, the brokerage house charges interest on debit balances and generates commissions. Not only is there an inherent conflict for the same firm to sell both commodity futures contracts and London commodity options there is the practical problem of re-training all of its sales personnel. Why kill the goose that is laying the golden egg for what has been traditionally the cornerstone of the most profitable part of the brokerage industry?

13. On one hand, the purchase of a London commodities option has limited risk - the cost of the option. On the other hand, the purchase of a futures commodity contract has an almost unlimited risk up to ten or twenty times his investment depending on the amount of margin he puts up. Many an investor has found out to his sorrow that although his total investment is only \$10,000 he all of a sudden owes \$50,000 because of a sudden adverse price movement.

14. British American has also been responsible for many of the back office innovations for better customer protections. The first was that we designed a system which enables a customer to promptly exercise his option contract in the event that there is an intervening financial impediment which would prevent the

the company from being in a position to execute the clients order. This back office technique involves the placing of the identical option number on the customers confirmation slip, our records and the identification number utilized by our clearing broker who is also a member of the International Commodity Clearing House and London Metals Exchange. As a result, if any company in the chain of execution can not perform the customer, the trustee in bankruptcy or such other party, as the case may be, can effectuate immediate execution of the order. We advised the plaintiff of this solution and deponent believes that many companies have adopted this technique. In addition, British American designed and implemented a system for more prompt payment to customers, which shortened the time of payment from approximately 10 business days to 4 business days, on executed orders. Finally, British American was the first company to adopt a system which permitted customers who exercised options purchased through the London Metals Exchange to elect prepayment on options sold before the expiration date of the option. All of these innovations were accomplished within the last five months.

15. That it is deponent's belief that the true intent of the plaintiff in deciding to institute this action when it did was to use it as a basis for a public relations campaign to deliberately destroy defendants relationships with its customers and to encourage our competitors to pirate our salesmen.

The improper destruction of the business of British American has absolutely nothing to do with the welfare of our customers, the welfare of our employees or the regulatory function of the plaintiff.

16. The Complaint was filed on July 22, 1976 with an Order to Show Cause returnable on July 27, 1976. Immediately prior to the return of the Order to Show Cause the Company received a telephone call from a customer, Harold Hartlaub, that he had received a communication that stated "British American Commodity Options Corp. is not registered with the Commodity Futures Trading Commission. The CFTC has instituted an injunction against British American Commodity Options Corp." There were no questions - just a simple announcement to the effect that the government was trying to put British American out of business.

17. I am advised by my attorney that the Court was advised of this, in the presence of three of the plaintiff's attorneys who stated that they had no personal knowledge of this and that it came as a complete surprise. Attached hereto are the copies of the letters from my attorney and one of the counsel to the defendants sent to the Court on the follow up to this problem which was of obvious concern to the Court and all parties.

18. The real purpose of instituting this litigation was confirmed when someone associated with the plaintiff contacted Barron's which then in turn published a malicious and derogatory

article on August 2, 1976, a copy of which is annexed hereto.

19. Prior to this time defendant enjoyed an excellent relationship-with its customers. The best evidence of this is that notwithstanding the plaintiff's extensive complaint solicitation program, both before and after the administrative proceeding was instituted, there is not one customer's affidavit submitted with their papers in support of the Order to Show Cause.

20. But now our competitors are engaged in a vigorous program to steal our salesman saying British American's application has been "turned down", when in fact it has not been "turned down" and that we are being put out of business by the CFTC. Our employees have been kept fully advised as to the status of the administrative proceeding. As a result, since Monday British American lost its entire Miami Branch Office (consisting of twelve salesmen, plus related clerical personnel) to one of its competitors, International Commodities of Chicago and eight of our best salesmen to Bristol Commodities in New York. A copy of a typical resignation letter from one of these eight salesmen is annexed hereto. The morale of the rest of our employees is at an all time low and unless this maliciously motivated injunction suit is immediately dismissed defendant will suffer irreparable harm.

21. How do you replace almost 30% of your sales force which in the last six months accounted for gross commissions in excess of \$600,000? How do you replace your one branch office which cost British American over \$50,000 to set-up? How do you keep the rest of your employees when it is so obvious that a bureaucratic agency will stop at nothing, irrespective of whether or not it is illegal or unethical, to destroy your business?

22. Deponent has worked an average of fifteen hours a day to make British American the leading company in the country specializing in London Commodity Options. When this business was formed hardly anyone knew about London commodity options. Now that deponent has built up a substantial business which has been able to popularize a viable investment vehicle the plaintiff has decided to attempt to destroy it by whatever means possible.

23. It is my belief that at all times in the operation of our business and in the various litigations British American has adhered to the highest ethical and moral standards. Now I ask this Court what good does it do? The history of the staff of the CFTC in its relations with us only shows that by acting properly and ethically our business is being destroyed overnight. On one hand, the CFTC has argued in our injunctive suit against them that we must first exhaust our administrative remedies and then three months later it brings a suit to put us out of business

so that there is no one to exhaust the administrative remedies. To make matters worse this suit is being used as the basis of a public relations campaign. In view of the Court's reservation of a decision in our injunctive suit against them, which includes a cause of action for improperly motivated false and misleading press releases, deponent can not believe that a Court will permit them to indirectly do what they can not do directly.

24. The statement in Barrons, which could have only come from the CFTC, that our "application has been turned down" is an outright falsehood. Our application has not been "turned down" or rejected as the CFTC alleges in their recent injunctive action. The plaintiff is well aware that there is presently pending a fully litigated administrative hearing to determine whether or not plaintiff's registration statement should be accepted or denied. I ask this Court, is there any meaning to "due process" or any significance to the administrative process when your business is maliciously and wantonly destroyed by employees of a federal agency?

25. Unfortunately this is only the latest example, and by far the most damaging, of the unauthorized and improper conduct of the staff of the plaintiff:

(a) the obtaining of customer data by the use of fraudulent and misleading representations to institute a complaint solicitation program.

(b) the dissemination of a false and misleading press release in contravention of the CFTC's own rules and regulations which was designed to defame deponent,

(c) the apparent contacting of our customers in contravention of their own oral and written representations to both our counsel and the Court.

26. All that the defendant has ever asked is that it be afforded the due process to which it is legally entitled. At no time has the plaintiff shown even the most basic understanding of due process or fair and proper conduct.

WHEREFORE, deponent on behalf of the defendant, its employees, and its valued customers respectfully requests that plaintiff's Complaint be dismissed.

John Forma
John Forma

Sworn to before
me this 6th day
of August, 1976

Charles J. Hecht

Notary Public

CHARLES J. HECHT
Notary Public State of New York
No. 52-731190
Qualified in Suffolk County
Term Expires March 30, 1977

July 28, 1976

Reference: 76-0003-C

Honorable Lee P. Gagliardi
Judge, United States District Court
for the Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Dear Judge Gagliardi:

in re: British American Commodity Options
Corp. - vs. - Bagley et al.,
76 Civil Action No. 1984; and
Commodity Futures Trading Commission
- vs. - British American Commodity
Options Corp., 76 Civil Action No.
3247

This will confirm the fact that at the conclusion of our meeting yesterday Mr. Hecht and I returned to his offices and called Mr. Harblous, the recipient of the document about which Mr. Hecht spoke. Mr. Harblous seemed unclear as to when he received the document, the content of the document and whether it was still in his possession. He promised to search for it; and if found he agreed to send it to Mr. Hecht who, I assume, will send me a copy. In the interim I have satisfied myself that no one employed by this agency was authorized to send any such document to anyone; and to the best of my knowledge, information and belief, no one employed by this agency sent such document to Mr. Harblous or anyone else.

BEST COPY AVAILABLE

I am Trusting that this is satisfactory for your purposes,

Sincerely,

Charles Harris
Special Counsel

cc: Charles J. Hecht, Esq. ✓
Frederic Spindel, Esq.

Charles J. Licht
COUNSELOR AT LAW
60 East 42nd Street
New York, N. Y. 10017
Telephone (212) 460-3232

See 1156

July 29, 1975

Honorable Lee P. Gagliardi
United States District Judge for the
Southern District of New York
Room 2603
United States Courthouse
Foley Square
New York, New York 10007

Re: British American Commodity Options Corp. v. Bagley,
et al., S.D.N.Y., 76 Civ. 1984

Dear Judge Gagliardi:

This is to advise you of the present status of the "business destruction" letters which are being received by my client's customers. After the conference in your chamber this Tuesday the substance of these letters was confirmed in a telephone conversation between the undersigned, Mr. Harris and a customer of my client at approximately 6:15 P.M. on July 27, 1976.

I was finally able to contact Mr. Harris yesterday afternoon and he advised me that he had no knowledge of this and that the sole basis for this assertion is that anything to do with British American before the CFTC must come across his desk and that since this did not come across his desk he believed that the CFTC was not involved. In a subsequent telephone conversation he suggested that a competitor could be behind this. In view of the prior proceedings in this case it is my opinion that this response should not be deemed satisfactory by the Court and is unsatisfactory to the undersigned.

I suggested to Mr. Harris that if, in fact, the CFTC was not directly or indirectly involved with the dissemination of such "business destruction" letters they should consent to a limited TRO with respect to this most urgent problem since it would not prejudice them if in fact they are not involved in this course of conduct. His response was that since the CFTC still maintains that this Court has no jurisdiction they could

not consent to any restraining order or injunction. Mr. Hartlaub's has advised the undersigned that his wife apparently threw away this written communication as he can not locate it.

Respectfully submitted,


Charles J. Hecht

cc: Charles Harris

By RICHARD A. DONNELLY

THE Commodity Futures Trading Commission last week announced that it was asking the courts to enjoin a vendor of options on London commodities from doing business here. The offender is British American Commodities Options Corp., which has a nice, bicentennial ring to it. The New York-based outfit is fighting the CFTC challenge, which is based on fairly narrow legal grounds. That is its application for registration as a commodity trading advisor (which costs \$50) was turned down by the federal agency because its president and sole stockholder has an unfortunate blot on his record: he's been barred by the Securities and Exchange Commission from dealing in stocks for the rest of his life. Also, the CFTC thinks British American has been vending London commodity options in an unsportsmanlike way, that is, it deceives its clients as to the nature of its considerable track-ups.

Oh, well, we yawned, caveat emptor and the like, and what was it Barnum said? Well, they really are born every minute, and we'll tell you more about that shortly, but first, a few words of background about commodity options selling, which is still in a regulatory no-man's land. For the nonce, nearly anyone can sell options on London commodities until the regulatory body finally arrives at a set of rules governing the somewhat slippery trade.

However, in the absence of such regulations, the CFTC decided it would ask anyone who wanted to operate in commodities to do the minimum; register as a commodity advisor. That costs \$50, as we've said, and you must pass a screening for such basics as felony conviction and the like. It automatically makes

joined with the CFTC as commodities advisers. Far from offering position words on the state of the world, most of them are vending options on London commodities.

So concedes CFTC's Thomas Russo, who notes, however, that that's just a temporary measure until the government agency comes up with its own rules in a few months. Since individual states have been preempted from the regulatory sphere by the feds, the field is wide open, and, naturally, there are abuses.

The beef against British American is that its president and sole stockholder, John Forma, has had his troubles with the SEC, which culminated, in April of 1975, in his being permanently enjoined from dealing in securities. So Forma turned to London commodity options and, says the CFTC complaint filed in Federal Court in New York last week, became an instant success.

The CFTC alleges that British American vended 2,173 options in the four months that ended on April 30 and another 1,400 or so since

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then to the public. It bought them from Shearson, Hayden Stone, which does a big business with ring dealers in London. The way we hear it, Shearson sells these options for between \$1,500 and \$2,000 apiece. In a CFTC affidavit, it is alleged that British American's markup averaged more

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

BRITISH AMERICAN COMMODITY
OPTIONS COPR.

Defendant

X

:

: AFFIDAVIT OF GEORGE PLAVE
IN OPPOSITION TO PLAINTIFF'S
: REQUEST FOR A PRELIMINARY
INJUNCTION

:

76 Civ. 3247 (COETTEL)

:

X

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK

George Plave, being duly sworn, deposes and says:

1. That he is the Treasurer of the defendant herein
(British American) and submits this affidavit in opposition to
the plaintiff's request for a preliminary injunction.

2. That after the administrative proceeding was instituted
our counsel requested that deponent prepare from the books and
records of British American a schedule of all completed customers
transactions from the date British American began business until
the date the administrative proceeding was instituted to be
utilized on our behalf in the administrative proceeding. The
portion of the schedule which relates to so called soft options
(International Commodity Clearing House) was prepared by my
staff under my supervision in the last week of April, 1976

and delivered to him prior to May 1, 1976. Certain portions of the schedule relating to "hard" options (London Metals Exchange) were prepared at the same time because the sales price could not be computed until the expiration date of these options, which was June 30, 1976 to give effect to the conversion rate of Sterling pounds on that date. The proceeds of sale column on these complete transactions was completed in the beginning of July and delivered to counsel on or about July 12, 1976.

3. On the advice of counsel customer account numbers instead of customer names were utilized to protect the confidentiality of our customer data which is a very important asset of the firm. At that time British American became aware that the CFTC was calling our customers to solicit complaints and was utilizing the customer data obtained during their inspection of our books and records on April 13 and 14, 1976 which I understand is part of a pending case of British American against the CFTC.

4. If the Court deems it appropriate British American will make its books and records available for review to a member of the Judge's staff in our offices. Although the books and records are needed on a daily basis deponent can also make arrangements to have such books and records available for in camera inspection between 9:00 P.M. and 9:00 A.M. during the week or over the week-end.

George Plave
George Plave

Sworn to before me
this 6th day of
August, 1976

Charles J. Nacht
Notary Public
Qualified in New York County
Commission Expires 12/31/77

CHARLES J. NACHT
Notary Public State of New York
No. 5711190
Qualified in New York County
Term Expires March 30, 1977